89-1506

Supreme Court, U.S.
FILED
MAR 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term 1989

JOSEPH M. GEDAN, et al.,

Petitioners,

v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, assuming Fed. R. Civ. P. 11 applies to the conduct of appellees in the federal courts of appeals, the court of appeals' award of Rule 11 sanctions *against* State officials, who invoked Fed. R. App. P. 38 to recoup their damages incurred in a *successful* defense on appeal of a dismissal of a civil suit filed in federal district court under 42 U.S.C. § 1983 seeking to restrain ongoing state attorney disciplinary proceedings, is an improper erosion of Rule 38 and this Court's settled jurisprudence governing such collateral challenges, *e.g.*, *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)?

2. Whether, in cases where sanctions against Appellee parties are not found by a court of appeals to be warranted under 28 U.S.C. § 1927, Fed. R. App. P. 46, or the court's inherent power, such a court may still impose sanctions against such parties under a federal common law of sanctions embodying an adoption of Fed. R. Civ. P. 11 for appellate filings on the theory that Rule 11 is "relevant" to proceedings on appeal?

3. Whether the summary award of Rule 11 sanctions on appeal on the basis of "motions" made solely in a Reply and Amicus Brief, and where Petitioners were not otherwise notified that sanctions against them were contemplated, constitutes such a departure from due process precepts as to warrant this Court's correction under this Court's supervisory authority?

PARTIES IN THIS COURT

Petitioners in this Court include Joseph M. Gedan, the Rule 13 Special Master in proceedings docketed in the Supreme Court of Hawaii variously as *In re: Earle A. Partington* (Haw. Spec. Master filed 1986), or *State v. Clarke*, No. 10041 (Haw. Spec. Master filed 1986), and a defendant in the district court and an appellee in the appeal below, which sought solely equitable relief. Because of the course of proceedings, it is Petitioners' view that Special Master Gedan was a party in the court of appeals solely in his official capacity, and the sanction against him, of which review is sought, is against him solely in that capacity. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)). However, Special Master Gedan also appears in his individual capacity in the event the judgment below against him is in such a capacity. *Id.* Petitioners also include Howard T. Chang, Rule 13 prosecutor in the Rule 13 proceedings, and a defendant-appellee below, who appears in his official and individual capacities in the same manner as does Special Master Gedan. Mark J. Bennett, Esq., appointed to succeed Petitioner Howard T. Chang as Rule 13 prosecutor in February, 1990, is also a Petitioner, but appears solely in his official capacity.

Respondents include Earle A. Partington, Esq., a Honolulu attorney and plaintiff and appellant in the courts below, and the Hawaii Association of Criminal Defense Lawyers, which was allowed to participate in both courts below as an *amicus curiae*, and which is a judgment creditor under the Ninth Circuit ruling.

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EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Joseph M. Gedan, Special Master appointed by the Supreme Court of Hawaii in *State v. Clarke*, No. 10041 (Haw. Feb. 3, 1986), *et al.*, officers of the State of Hawaii ("State officials"), respectfully pray that a writ of certiorari issue to review that part of the adverse judgment and opinion (Part V thereof) of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 13, 1989, as amended by the court's orders of April 12, 1989, and July 12, 1989.

OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 880 F.2d 116 (9th Cir. 1989), and is reprinted

in Appendix ["App."] A. The order of the United States District Court for the District of Hawaii, granting, *inter alia*, defendants' motion to dismiss is unreported and is reprinted in App. C. Other opinions related to the petition include the unreported Memorandum Opinion of the Supreme Court of Hawaii in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985), which is reprinted in App. D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit awarding sanctions against Petitioners, prevailing parties in the Court of Appeals, for their motion seeking to recover their fees, costs, and expenses incurred in that successful effort, was entered on March 13, 1989. A timely petition for rehearing was filed by Petitioners on March 27, 1989, and was denied on December 22, 1989. A petition for rehearing and suggestion of the appropriateness of rehearing *en banc* filed by respondent Partington were also denied December 22, 1989. *See* App. B. Under 28 U.S.C. § 2101, and S. Ct. R. 13.4, the time in which this Petition may be filed extends to and includes March 22, 1990, and this Petition was timely filed. While the judgment awarding sanctions, of which review is sought, remanded their computation to the District Court, the judgment is final in all relevant respects. Jurisdiction in the District Court was alleged to have been conferred by 28 U.S.C. § 1343(3). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 1912 of Title 28 of the United States Code provides in relevant part that

> Where a judgment is affirmed by . . . a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Section 2071(a) of Title 28, United States Code, provides

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Section 2072 of Title 28, United States Code, provides

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force of effect after such rules have taken effect.

Rule 38 of the Federal Rules of Appellate Procedure provides

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Ninth Circuit Rule 1-1 provides in relevant part that

> The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, whenever relevant, are adopted as part of the rules of this court.

Rule 1 of the Federal Rules of Civil Procedure provides in relevant part that

> These rules govern the procedure in the United States district courts in all suits of a civil nature. . . .

Rule 11 of the Federal Rules of Civil Procedure provides in relevant part that

> The signature of an attorney or party [upon a pleading, motion, or other paper] constitutes a certification by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . .If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing. . . .

Hawaii Supreme Court Rule 13 is reprinted in Appendix E.

STATEMENT OF THE CASE

For nearly two decades, the rule of restraint laid down in *Younger v. Harris*, 401 U.S. 37 (1971), has been an established part of this Court's commitment to maintaining "the comity between the States and the National Government" and avoidance of "unwarranted determination of federal constitutional questions." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Its main premise is that "[c]ertain types of injury, in particular, the cost, anxiety and inconvenience of having to defend against a single criminal [or important civil] prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." *Younger*, 401 U.S. at 46. The mandate to dismiss collateral federal equitable claims, which, if granted, would interfere with ongoing state proceedings

that offer an adequate opportunity to raise federal defenses, has been held by this Court to be applicable in numerous cases. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 627 (1986). While not all such expansions have been met with unanimous approval, *Younger's* extension to suits seeking to restrain state attorney disciplinary proceedings "within the jurisdiction of the appropriate State Supreme Court" (*id.*) has this Court's unquestioned support. *See Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (majority op.); *id.* at 438 (op. of Marshall, Brennan, Blackmun, and Stevens, JJ.).

It is also clear that *Younger* concerns are at their zenith when state courts have not been given the chance to pass on federal claims. The rule that a federal plaintiff must show "state procedural law bar[s] presentation of [its] claims," *Moore v. Sims*, 442 U.S. 415, 432 (1979), is an established one. As *Pennzoil* reaffirms, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of *unambiguous* authority to the contrary." 481 U.S. at 15 (emphasis added). Indeed, such prudential dictates have been part of this Nation's settled law for over 185 years, and have "for so long been applied by this Court that [they are] beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (citing *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804)).

In the autumn of 1987, after *Pennzoil* was decided, the Department of the Attorney General of the State of Hawaii moved in the United States Court of Appeals for the Ninth Circuit, under Fed. R. App. P. 38, and other authority, for the damages incurred in being required to defend against an appeal from a District Court ordered dismissing, under *Younger*, a suit seeking to restrain, as in *Middlesex*, ongoing state attorney discipline proceedings, and

where, as in *Moore* and *Pennzoil*, state law allowing federal defenses to be heard remained untested in the ongoing state proceedings, offered a full panoply of procedural rights, and was, at least, ambiguous – in short, a case where it was reasonably believed to be appropriate to assert that this Court's decisions squarely and fully dictated affirmance.

The court of appeals, albeit by a divided vote, found the case "strikingly similar" to *Middlesex*, and flatly rejected every effort to distinguish it (A15, A16-35). It held, for example, that *Pennzoil* eliminated any basis for federal interference on the ground that the attorney in question lacked "the opportunity in the ongoing state proceedings to raise his constitutional claims 'and have [those claims] timely decided by a competent state tribunal' " (A16-30). Likewise, although the "bad faith" and "harassment" exceptions to *Younger* were not – at least not clearly – raised on appeal, the panel rejected any basis for finding bad faith (A30-31), and overruled any assertion that the state law at issue, which simply authorizes a Special Master's *de novo* inquiry and recommended action against criminal defense counsel where the state courts have vacated a conviction based on ineffective assistance, met the stringent standards for an "extraordinary circumstance" exception to the *Younger* doctrine (A31-32). Finally, the panel also found that a claim, which, in essence, directly attacked *Younger's* irreparable harm analysis, was not preserved, and, in any case, raised serious independent jurisdictional concerns under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Despite these findings, based upon a "motion" made in the Reply Brief and an Amicus Brief, both filed after the Answering Brief was lodged, and despite Petitioners' every effort to assure the courts below that the plaintiff attorney would enjoy a full chance to be heard before sanctions were ordered against him in state court, the Ninth Circuit, without giving any specific notice that sanctions against Petitioners were being considered, and

reasoning that several of the underlying claims sought to be decided in federal court (but which were barred by *Younger*) were "important," and that the "arguments that *Middlesex* did not compel abstention were excellent," granted sanctions *against* Petitioners under Fed. R. Civ. P. 11 for their request for damages under Rule 38. The central issue on this Petition is whether the Ninth Circuit's recognition of an expansive category of "meritless-but-not-even-arguably-compensable" appeals from *Younger* dismissals, and award of summary Civil Rule 11 sanctions on appeal, against prevailing appellees for conduct not otherwise sanctionable, ought be allowed to stand.

A. Background of the Litigation; Supreme Court of Hawaii Rule 13 and the Protections Available to Respondent Counsel

This case arises from the paradox created by the Sixth Amendment mandate that an indigent "accused shall enjoy [not only] the right . . . to have the Assistance of Counsel for his defense," but " 'the right to the *effective* assistance of counsel.' " *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see also* Haw. Const. art. I, § 14; *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). Because of the vexing reality that a defendant may "win by losing," and Hawaii's "legitimate wish" "that [its] judgments remain intact on appeal," *Wheat v. United States*, 486 U.S. 153, 161 (1988), the Hawaii Supreme Court promulgated a rule intended properly to deter and remedy the unnecessary generation of "ineffective assistance" errors.

Rule 13 provides for the commencement of a Special Master's inquiry and recommendation "[w]here the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final[.]" Haw. S. Ct. R. 13 (A94). The Rule requires appointment of a master "to determine whether action

against the counsel alleged to have been incompetent is warranted" (*id.* ¶ 2), and authorizes avenues for raising defenses by the respondent attorney "why corrective action . . . should not be taken," appointment of a Rule 13 prosecutor, discovery, evidentiary hearing, recommended decision, and review in the Supreme Court of Hawaii (*id.* ¶¶ 2-9 (A94-96)). Review is also available under the all-writs power, Haw. Rev. Stat. §§ 602-5(6) & (7).

For several reasons, both evident on the face of the rule, and from other provisions of Hawaii law, the decision of all issues by the Special Master, including the underlying issue of ineffective assistance, is *de novo*. The Rule expressly treats a respondent attorney as having been only "alleged to have been incompetent," and grants the Special Master (and the Supreme Court) the express authority to dismiss the proceedings for any reason "why corrective action . . . should not be taken" (Rule 13 ¶¶ 4,7 (A94-95)). These include the claim that ineffectiveness did not occur. Under settled Hawaii preclusion principles, the triggering finding of ineffectiveness has no bar, merger, issue preclusive, or law of the case effect, particularly when reversal occurs on a direct appeal. This is true as a respondent attorney could not possibly be in privity with his former client on the issue of ineffectiveness. *See Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965 (1982) (per curiam); *cf. Martin v. Wilks*, 109 S. Ct. 2180, 2185 (1989) ("a party seeking a judgment binding upon another cannot obligate that person to intervene"). A fortiori, any federal reason why sanction may not issue may be advanced to the Special Master. *See id.*

Hawaii law also makes clear that the respondent attorney is not required to respect the confidences of his former client. Under DR 4-101(c), *codified at* Haw. S. Ct. R. 2.2(a) (1984), the respondent lawyer "may reveal . . . confidences or secrets necessary . . . to defend himself against an accusation of wrongful conduct." No Hawaii case, moreover, limits this "self-defense" exception to the attorney client privilege to

instances where the client charges that the lawyer's conduct is wrongful.

The Rule permits full review of the master's report in the Supreme Court of Hawaii. *See* Rule 13, ¶ 10 (A95-96). The state supreme court retains complete discretion to order "dismissal of the proceedings" (*id.*), and, under Hawaii caselaw, it is clear that the Supreme Court may consider any constitutional claim why remedial measures ought not be imposed, even if the Master may not. *HOH Corp. v. Licensing Board*, 736 P.2d 1271 (Haw. 1987).

So understood, Rule 13 closely and compellingly serves interests at the heart of Hawaii's criminal justice system. The Rule's overriding purpose is to protect criminal defendants who are in fact innocent, but whose defenses are not believed on account of their counsel's ineffectiveness. In this critical way, the Rule reflects the state court's commitment "to enforce the Supreme law of the land." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985). Thus, the Rule "stands as a disincentive for competent attorneys" to turn criminal trials " 'into reversible trials,' " *State v. Smith*, 68 Haw. 304, 313-14, 712 P.2d 496, 502 (1986), and, by recognizing that "the law" includes a criminal defendant's own rights, confirms that "counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

B. The Rule 13 Proceedings Here and Proceedings in the United States District Court

In December 1985, the Hawaii Supreme Court triggered the filing of a Rule 13 case against respondent Earle A. Partington, a Honolulu lawyer, by finding, in a direct appeal, that Clifford Clarke was denied effective assistance of counsel by Partington's representation at Clarke's murder trial in 1984. *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (A91-93). Exercising its right to "apply [its] plain-error rules," *Engle v. Isaac*, 456 U.S. 107,

135 n.44 (1982), the court found Partington ineffective because he (1) did not make an opening statement; (2) did not cross-examine the victim's mother ostensibly because the State did not make available records concerning her; (3) did not call the mother after receiving the records; (4) elicited testimony from two State witnesses that they believed Clarke was guilty; and (5) did not make a closing argument.[1] The State supreme court vacated the judgment of conviction, and Rule 13 proceedings were commenced in February 1986 with the appointment of Petitioner Joseph M. Gedan as Special Master. *See* 880 F.2d at 119, A8. Respondent Partington filed an answer asserting that his decisions in *Clarke* were based on legitimate trial tactics, but that the attorney-client privilege prevented him from revealing the bases therefore. *Id.* Petitioner Howard T. Chang was appointed Rule 13 Prosecutor in August, 1986. *Id.*

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[1] *See* A91-93; 880 F.2d 118, A3-4. Though Partington, as appellate counsel, had not included trial ineffectiveness in the Opening Brief in *Clarke*, he did inform the appellate court prior to argument that the state trial judge had complained to the Office of Disciplinary Counsel about the failure to make a closing argument. *See* 880 F.2d at 118, A3. The judge's complaint stated that "by failing to give a final argument to the jury on behalf of his client and by stating in the presence of the jury that it would be a 'waste of time', Mr. Partington intentionally attempted to make reversible error, i.e., to prejudice his own client's case for the purpose of forcing an appellate court to reverse what Mr. Partington anticipated would be a conviction." Letter from Leland Spencer to Office of Disciplinary Counsel (Aug. 1, 1984), at 3, Exh. "B" to Complaint, No. 87-0172 (D. Haw. filed Mar. 9, 1987), Clerk's Record 1. In his Opening Brief in the court of appeals below, Partington conceded that, with his client's consent, he stated "that a closing argument would be a waste of time" (A141), but did not concede the statement was made in the jury's presence.

On March 9, 1987, while the Rule 13 proceedings were fully pending (albeit behind the schedule identified in Rule 13), Respondent Partington filed the action below in the United States District Court for the District of Hawaii, seeking an injunction prohibiting the State officials from proceeding against him under Rule 13 and a declaratory judgment that Rule 13 is unconstitutional. 880 F.2d at 119-20, A8-9. Partington asserted that the continued pendency of the Rule 13 case violated his rights under the First, Fifth, and Sixth Amendments, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause. *Id.* at 119, A8-9. On July 1, 1987, after granting Respondent Hawaii Association of Criminal Defense Lawyers ("HACDL") leave to file as *amicus curiae* in support of Partington, the District Court, Kay, J., granted Petitioners' motion to dismiss, or for summary judgment, under the authority of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny (A86-87). Citing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the court rejected Partington's suggestion "that the Hawaii Supreme Court has prejudged this case," and found the absence of "even an inference of prejudice" (A88). The court rejected the claim that *Withrow v. Larkin*, 421 U.S. 43 (1976), forbade dismissal (A88-89), and noted Partington did not argue that Rule 13 "is 'flagrantly and patently' unconstitutional" so as to counsel against dismissal (A90). Having so found, the court also rejected Partington's summary judgment motion (*id.*).

C. Proceedings in the United States Court of Appeals

On appeal, Partington's argument began with a recitation of the purported "constitutional rights in issue" (A103). Thus, although Partington's license remained fully intact, and he remained in good standing in Hawaii's courts, Partington asserted that his First Amendment rights were breached by the *Clarke* ruling and "the ongoing HSCR 13 proceedings" (A104). Despite *Paul v. Davis*, 424 U.S. 693 (1976), Partington asserted that the

alleged defamatory impact of the triggering ruling in *State v. Clarke* constituted a violation of his procedural due process rights (A105-09). Despite standing concerns, Partington claimed the reversal in *Clarke* entitled *Partington* to relief under the Sixth Amendment (*id.* at 109-14). Finally, Partington argued Rule 13 breached Equal Protection precepts, as it did not apply to prosecutors, and was not applied to a defense attorney found ineffective by the Ninth Circuit in a habeas case (A114-21).

On the main issue whether abstention was mandated, Partington made two claims why *Younger's* familiar test was not met:[2] (1) "the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel," 880 F.2d at 123, A17; and (2), that "both the special master and the Hawaii Supreme Court are biased against him." *Id.* at 124, A20; *see* A123-31. These asserted procedural infirmities were advanced on the basis of a naked assertion that it would be "impossible" for Partington to breach the attorney/client privilege, and, in regard to the bias issue, on the basis of the publicity attending *Clarke*, and a claim that it was "nonsense" to believe that Partington would be able to relitigate the ineffectiveness of counsel issue. A114, 132.

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[2] Partington made no argument that the "bad faith" exception was implicated, and mentioned, only in a footnote (A133 n. 21), that Rule 13's asserted "blatant unconstitutionality" gave rise to " 'exceptional circumstances.' " As the Ninth Circuit later stated, Partington also claimed abstention was inapt because the Rule 13 case could not cure the injuries inflicted by the triggering order in *State v. Clarke*. *Compare* 880 F.2d at 129-30, A34-36, *with* A121. As Petitioners proved (*see* A180-82), in addition to posing Article III remedial standing issues, this amounted to an argument not why the *Younger* doctrine is inapt, but, rather, an argument why *Younger* should simply not exist.

Although *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), had been issued months before the appeal was filed, the Opening Brief did not cite or apply the rule that "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* at 15. Indeed, the *Pennzoil* case was mentioned nowhere in the Opening Brief.[3]

In their Answering Brief, Petitioners stressed that, properly construed, state law was fully protective of Partington's ability to raise his federal claims in the Rule 13 proceeding, and that, given *Pennzoil*, which was not even cited in the Opening Brief, Partington's effort to distinguish the case from *Middlesex* was frivolous. *See* A154-58, A165-66, A172-79. Petitioners also demonstrated that Partington's effort to evade the *Younger* doctrine on the basis of the purported immediate reputational injury he has suffered on the basis of the *Clarke* decision was nothing less than an argument that the Ninth Circuit should overrule the *Younger* doctrine itself, A179-84, and that any claim that "bad faith" or other "exceptional circumstances" warranting denial of an otherwise viable *Younger* defense were not remotely supported. A184 n.7. Since Partington sought not just reversal of the *Younger* dismissal, but a forthwith injunction from the Court of Appeals, Petitioners argued to the effect that Partington's

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[3] Partington concluded by asserting that, as a matter of law, none of the claimed faults in his defense of Clifford Clarke, taken separately, rendered his defense ineffective (A137-42). The brief did not cite Hawaii law even for the proposition that each asserted instance of ineffectiveness could not give rise to ineffectiveness, and cited no authority for the conclusion that, as a whole, his strategy was proper under Hawaii law.

underlying claims were not, at the time, substantial, let alone deserving of an injunction. A184-88.[4]

Pursuant to Ninth Circuit rules that require a party seeking its attorneys fees on appeal to cite authority for the award therefore in their Opening Brief, the State officials moved in their Answering Brief for an award of their attorneys fees, expenses, and costs, pursuant to, *inter alia*, Fed. R. App. P. 38. Although parts of the Answering Brief did suggest that Partington's underlying claims were frivolous,[5] Petitioners made clear in their specific argument in support of fees that a Rule 38 award was sought based on the insubstantiality under controlling law of Partington's effort to evade a *Younger* dismissal:

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[4] Thus, Petitioners asserted that, in light of Partington's continuing right to practice and hold himself out "as a competent and vigorous attorney," First Amendment and Due Process concerns were, even in their best light, premature, A185-86. Petitioners also asserted that Partington's so-called Sixth Amendment argument was "simply frivolous" insofar as he had no standing to assert Clarke's purported Sixth Amendment right not to have his conviction reversed on ineffective assistance grounds (A186). Finally, Petitioners argued that because rational grounds clearly justified the distinct regulatory burdens imposed on defense counsel, and warranted a refusal to extend Rule 13 to convictions reversed on federal habeas, the Equal Protection claim was also "without foundation" (A188).

[5] Although the general heading for Part "B" of the Answering Brief stated "Each of Partington's Substantive Claims is Frivolous," the term "frivolous" was omitted from the subheadings and rest of those parts of the "Argument" section relating to Partington's procedural due process, First Amendment, and Equal Protection claims. *See* A185, 186, 188. As noted *supra* n.4, Appellees never denied Partington had – and has – substantial due process rights; rather our principal defense to the procedural claim is that Partington has not been "deprived" of anything to which due process protections are federally mandated.

> The central point here is that this Court has repeatedly recognized that *Younger* bars just such attacks on bar disciplinary proceedings, *e.g., Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983); *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 469 (9th Cir. 1984); *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). The manner in which Partington sought to distinguish this case from *Middlesex* simply ignores the manner in which state procedural law is to be construed in light of *Pennzoil*, or simply elevates constitutional interests to a level that *Younger* squarely rejected more than fifteen years ago.

Appellees' Ans. Brief at 44, No. 87-2375 (9th Cir.) A190.

A divided Ninth Circuit panel (Wallace and Noonan, JJ.), affirmed, finding the case "strikingly similar" to *Middlesex*, and rejecting under *Pennzoil* and other authority each challenge to the adequacy of the state proceedings for *Younger* purposes. 880 F.2d at 122, 123-28, A15, A16-30. The majority rejected any claim that the state proceedings were animated by "bad faith," dismissed claims that Rule 13 was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *id.* 128-29, A30-32, and denied, as not properly raised, the claim that the *Clarke* reversal's impact made abstention inapt. *Id.* 129-30, A32-33.

Despite Petitioners' efforts to construe Partington's due process rights broadly, the panel, acting on "motions" made only in Partington's Reply and in HACDL's amicus brief filed *after* the Answering Brief was lodged (A191-215), to which no response was allowed under Fed. R. App. P. 28(c), and without having given notice that sanctions against Petitioners were being considered, grant sanctions *against* Petitioners for seeking their fees and expenses pursuant to Fed. R. App. P. 38.

While appearing to agree, implicitly, that Partington's "Sixth Amendment" claim was frivolous, the

panel found that sanctions were appropriate against Petitioners because Partington's First Amendment, procedural Due Process, and Equal Protection claims were "important" and that, despite *Pennzoil*, the "arguments that *Middlesex* did not compel abstention were excellent, although not ultimately meritorious." *Id.* at 131, A37-38. The court, while purporting to follow the Seventh Circuit's approach in *Meeks v. Jewel Co.*, 845 F.2d 1421 (7th Cir. 1988), which only denied prevailing appellee their taxable costs for making an improper Rule 38 motion, in fact imposed affirmative monetary sanctions under "Rule 11." 880 F.2d at 131, A36-37.

Judge Noonan concurred and filed a separate opinion. Judge Reinhardt dissented from the merits and concurred in the award of sanctions, reasoning, however that, while in his view sanctions were warranted under 28 U.S.C. § 1927, the panel ruling conflicted with the Seventh Circuit as to the availability of Rule 11 on appeal, and that the court could not "properly adopt Rule 11 for appellate proceedings through the exercise of our decision making function," *id.* at 148, A81-82. After Petitioners moved for rehearing as to the sanctions on substantive and procedural grounds (A216-238), and responded to the panel's request that separate briefs be filed on whether *en banc* review is warranted on "availability of Rule 11 sanctions for conduct occurring during appeal" (A239-56), the court denied further review (A90)

REASONS FOR GRANTING THE WRIT

The judgment below summarily imposing Rule 11 sanctions against Petitioners for their request for appellate damages – in an appeal that Petitioners won and where the literal statutory predicates for consideration of such an award under 28 U.S.C. § 1912 were met – merits

review on several important fronts.[6] For in not merely denying the State Officials' prayer to be recompensed for the cost of Partington's appeal, but in affirmatively punishing Petitioners for even asking that such an award be considered, the Ninth Circuit indirectly, but, nonetheless, critically, has undermined this Court's controlling precedents and eroded Appellate Rule 38's legitimate scope. Permitted to stand, the sanctions judgment in this case will have far reaching effects in encouraging the very sort of collateral litigation that this Court has emphatically held does not belong in federal court, and, in effect, grants absolute immunity to all litigants who, in the face of this Court's commitment to federal judicial restraint, comity, and Federalism, make arguments denigrating state law and the fairness of state judges that have repeatedly led to plain error reversal, and even sharply worded rebukes, in this Court. The award of sanctions against Petitioners, moreover, conflicts with numerous decisions in the courts of appeals, and is incorrect as a matter of sanctions law under the panel's own standards. It should be reversed.

Apart from these considerations, review is independently warranted because the panel analysis upsets the framework under which sanctions against appellee parties are to be judged under title 28 and the Federal Rules of Appellate Procedure. On this score, the panel's enforcement of Rule 11, which is, with the apparent exception of the Ninth Circuit, understood to apply solely to conduct in the district courts, conflicts with specific rulings of at least three other circuits, and departs from settled principles of construction. Finally, review should

[6] Petitioners do not seek review of the Ninth Circuit's judgment denying their Rule 38 request, although the argument why that request was not sanctionable will be, perforce, related to the reasons why sanctions were sought in the court below.

be granted to correct the Ninth Circuit's substantial departures from Due Process precepts in imposing on Petitioners the sort of summary sanction that the panel implied – and which Petitioners do not dispute – would be improper if awarded by a state court.

A. Review Should Be Granted to Correct the Court of Appeals' Departure, in Punishing Petitioners' Request for Appellate Damages, from Settled Abstention and Constitutional Precepts.

In seeking their Rule 38 damages below, Petitioners began with the uncontroversial notion that "a precedent of this Court must be followed by the lower federal courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Thus, although the panel majority observed that "Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent," this observation failed to recognize that *Pennzoil* (and numerous other cases), too, were entitled to obedience. Partington's refusal even to cite *Pennzoil* in the Opening Brief (A97-143), or, even in the Reply (A191-216), was simply what the Seventh Circuit has condemned as " '[t]he ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist.' " *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987).[7]

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[7] Likewise, despite Partington's passing footnote reference to the "exceptional circumstances" codicil to the *Younger* doctrine, his brief nowhere remotely demonstrated that Rule 13 suffered the sort of egregious defects under that virtually insurmountable test: namely, that the rule is " ' "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it." ' " 880 F.2d at 128, A31. Indeed, even the panel found that Partington at most had raised some "colorable arguments." *Id.*

Although fee-shifting under Rule 38 is allowed only "to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and expense of defending the district court's judgment," *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 7 (1987), here the underlying governing law affecting the *Younger* doctrine imposed such strict standards that Petitioners' request was at least colorable. To borrow from the summary judgment context, viewing Partington's appeal "through the prism of the substantive evidentiary burden," a request for Rule 38 sanctions was at least arguable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

Indeed, the arguments below for evading *Younger* were at odds with extensive precedent, for they depended on reading Hawaii law so as to generate federal arguments that did not exist. Whether or not Partington's assistance in *Clarke* was plain error, this approach was. *See Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988) (citing cases). Partington's effort to construe Rule 13 and related procedural law breached principles of restraint that have "for so long been applied by this Court [as to be] beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). If Rule 38 means anything, it is that an appeal may not rest on precepts that are "beyond debate." In fact, Members of this Court have not minced words in chastizing counsel who bring such feigned cases. *See Superintendent v. Hill*, 472 U.S. 445, 459-60 (1985) (Stevens, joined by Brennan, and Marshall, JJ.). Petitioners submit these admonitions compel review, and reversal.

Partington's appeal also reasonably could be challenged as meriting sanctions as it attacked the fairness of the state judiciary simply because of *Clarke*. As one court has stated:

> [T]he argument [of bias] is frivolous. Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it "in" for the party for

> reasons unrelated to the officer's view of the law, erroneous as that view might be.

McLaughlin v. Union Oil of California, 869 F.2d 1039, 1047 (7th Cir. 1989); *see also Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988); *INVST v. Chem-Nuclear Sys.*, 815 F.2d 391, 402-03 (6th Cir. 1987); *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) As this Court has held, "[c]harges of disqualification should not be made lightly." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986). Here, they were. In fact, the effort to effect a preemptive recusal order was the sort of "sweeping" request that "inverts traditional abstention reasoning." *Moore v. Sims*, 442 U.S. 415, 422 (1979).

That Partington might have had colorable underlying federal claims ought not control whether Petitioners' Rule 38 motion was frivolous. Even litigants with good claims may incur sanctions because of a time bar, jurisdictional impediment, or a prior judgment. *See* 121 F.R.D. 101, 119-20 (1988). Our effort to extend these rulings to the *Younger* context did not prevail, but were not frivolous. *See Davis v. Crush*, 862 F.2d 84 (6th Cir. 1988) (sanctions for ignoring *Younger* sustained in the District Court, although reversed on appeal). Partington's appeal enjoyed qualified, not absolute, immunity, and that sanctions had not been imposed in an identical case did not make a Rule 38 request frivolous. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As the sanction here creates an anomalous privilege to file federal suits precisely where this Court has barred federal interference with state proceedings, the writ should be granted and the judgment reversed.[8]

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[8] Indeed, despite the panel's conclusion that Partington's First Amendment, Due Process, and Equal Protection challenges were "important," colorable arguments could be made that such arguments were plainly disposed of by controlling precedent. *See, e.g., Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987) ("The Constitution does not create fundamental interests in particular types of employment," and "the right to

(Continued on following page)

B. Review Should Be Granted Because Unrestricted Availability of Rule 11 Sanctions in the Courts of Appeals is Contrary to the Remedial Structure Established by Congress and This Court.

As suggested above, Petitioners' central argument why the sanctions below merit review and ought be reversed is that "this is simply the wrong case in which to apply a *Meeks* sanction" (A217-18) (citing *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421 (7th Cir. 1988)). Thus, Petitioners undeniably agree that "[t]here is no, nor should there be, protection for 'baseless litigation' " (A217) (quoting *McDonald v. Smith*, 472 U.S. 479, 484 (1985)), and that the sanctions rules are no less susceptible to abuse than other grounds for relief. When they are abused, federal courts should act properly to deter such abuse.

In this case, as the majority's and Judge Reinhardt's opinions make clear, the panel did not believe that sanctions were warranted under 28 U.S.C. § 1927 or Fed. R. App. P. 46(c), which facially authorize sanctions solely against attorneys, not parties, or the court's inherent power. *Compare* 880 F.2d at 130-31, A34-35, *with id.* at 148-49, A82-83. Instead, the majority rested its sanction against Petitioners solely on its belief that the court had

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(Continued from previous page)

practice law is not a fundamental right for purposes of due process or equal protection analysis.") (citing cases); *see also Paul v. Davis*, 424 U.S. 693 (1976) (on procedural due process); *Younger v. Harris*, 401 U.S. 37, 49 (1971) (on the First Amendment). As this Court suggested in *Nietzke v. Williams*, 109 S. Ct. 1827 (1989), a claim is frivolous if "no rational argument" could be made for it. *Id.* at 1820 n.2. Relatedly, as " '[f]rivolity, like obscenity, is often difficult to define,' " *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987) (en banc), Petitioners submit that the Ninth Circuit's award of sanctions *against* Petitioners is erroneous under any standard of review this Court may adopt in *Cooter & Gells v. Hartmarx*, No. 89-275.

"power to sanction Gedan and Chang pursuant to Rule 11." 880 F.2d at 130, A34. In so doing, the panel, while content to indulge limiting constructions of the sanctioning power available in state court under Rule 13, was not similarly influenced by the substantial arguments raised both by Judge Reinhardt and on the panel's request for supplemental briefing, why Rule 11 does *not* apply to papers filed solely in the appellate courts. Because the panel ruling creates a palpable inter-circuit conflict with the Sixth, Seventh, and Tenth Circuits,[9] and resolves the issue in a manner that conflicts with controlling principles of construction, review and reversal of the sanctions award is independently required. *Peralta v. Heights Medical Center*, 485 U.S. 80, 86 (1988).

As noted by the parties in *Cooter & Gells v. Hartmarx*, No. 89-275, the proposition that " 'Rule 11 applies exclusively to district court proceedings' " is "uncontroversial." *See* Resp. Answering Brief at 40, No. 89-275 (U.S. argued Feb. 20, 1990); *see also* Amicus Curiae Brief of the Association of Trial Lawyers of America at 17, *id.* Indeed, this result is compelled not only by the plain language of Fed. R. Civ. P. 1, 81, and 82, but by the Advisory Committee notes, which state that Rule 11 was intended to foster "[g]reater attention by the *district courts* to pleading and motion abuses" (emphasis added). Nothing suggests Rule 11 was meant to be applicable to conduct wholly on appeal, or that the sanctions available to redress improper litigation by appellees, and their counsel, namely, 28 U.S.C. § 1927, Fed. R. App. 46, and the inherent power, were intended to be augmented by Rule 11. *See Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976). Yet

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[9] *See Leigh v. Engle*, 858 F.2d 361, 370 n.5 (7th Cir. 1988); *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988); *Braley v. Campbell*, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) (en banc).

in adopting Rule 11, the Ninth Circuit has, for all practical purposes, so held. In this regard the existence of Ninth Circuit Local Rule 1-1, which provides that "[t]he Federal Rules of Civil Procedure, . . . whenever relevant, are adopted as part of the rules of this court," does not ameliorate the conflict, for the Ninth Circuit's conclusion that the "whenever relevant" language permits Rule 11 to be swept up into the appellate courts is entirely circular. *See* 880 F.2d at 130, A34-35 (and cases, *e.g., In re Mooney*, 841 F.2d 1003 (9th Cir. 1988), cited therein). Indeed, even were such an incorporation of Rule 11 by local rule clear, 28 U.S.C. § 2071 requires that such rules "be consistent with' the 'rules of practice and procedure prescribed by the Supreme Court.' " *Frazier v. Heebe*, 482 U.S. 641, 646 (1987). Because, at the least, the same principles of lenity ought to have applied to Respondents' requests for sanctions as were indulged in rejecting what we submit was Petitioners' colorable affirmative prayer, the judgment should be reviewed, and the sanctions reversed.

C. Review Should Be Granted to Correct the Court of Appeals' Departure from Settled Procedure in Awarding Sanctions.

As this Court has only recently emphasized, unless post-deprivation remedies are "the only remedies the [Government] could be expected to provide," due process requires "some kind of hearing *before* the [Government] deprives a person of liberty or property." *Zinermon v. Burch*, 58 U.S. L.W. 4223, 4227, 4228 (U.S. Feb. 27, 1990). Indeed, Petitioners' central point in urging affirmance below was that Partington would be provided with just such process before any sanction were entered against him in the state courts. The enduring irony of this case is that, while properly concerned with the "guarantee of fair procedure" in *state* court, *id.*, the Ninth Circuit paid little heed to this requirement in issuing its own sanctions against Petitioners.

Although the form of procedure required by the Due Process Clause before sanctions may be imposed is necessarily flexible, it is conceded by virtually every federal court that sanctions "may not be imposed upon a person who is not on notice of (a) the fact that sanctions are under consideration, [and] (b) the reasons why sanctions are under consideration." *See ABA Guidelines*, 121 F.R.D. at 127 (and cases cited); *Tom Growney Equipment, Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 836-37 (9th Cir. 1987).

Here, as the prayers for sanctions were made, if at all, for the first time in the Reply and Amicus Briefs, to which no response is allowed under Fed. R. App. P. 28(c), and which, for this reason, would be deemed procedurally improper under controlling law, *e.g., Northwest Acceptance Corp. v. Lynwood Equipment Inc.*, 841 F.2d 918, 924 (9th Cir. 1988), for all practical purposes the sanctions here were issued *sua sponte*, and on the basis of considerations which were not even those precise reasons raised (improperly) by Respondents (*see* A191-215). While such a course of procedure may be fair in some instances, where there are no "arguable issues," *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544 (1985), the foregoing arguments in this Petition demonstrate that this is plainly not so here. Although the opportunity to move the court of appeals for rehearing, or to seek review here, certainly redresses in part a litigant's sense that they have been treated unfairly, the Ninth Circuit's summary imposition of sanctions in this case, which is, except for the possibility of review here, final and subject only to a computation proceeding in the District Court, is surrounded by sufficient constitutional doubt to warrant review, and reversal, under the supervisory authority. *See Frazier v. Heebe*, 482 U.S. 641, 645 (1987); *id.* at 651 (Rehnquist, C.J., joined by O'Connor and Scalia, J., dissenting) (agreeing that the supervisory power properly exists to "modify or reverse judgments of lower federal courts in accordance with principles derived neither from the United States constitution nor from any Act of Congress");

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 (1985) (citing *Ashwander v. TVA*, 297 U.S. 288, 341-356 (1936) (Brandeis, J., concurring)).

CONCLUSION

For the reasons above, the Court should grant the petition for certiorari and summarily reverse that part of the judgment below (Part V thereof) imposing sanctions against the Petitioners, or set the case down for plenary argument in this Court, and, thereon, reverse the sanctions against Petitioners.

Respectfully submitted, March 22, 1990.

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APPENDIX A

Earle A. PARTINGTON,
Plaintiff-Appellant,

v.

Joseph M. GEDAN; Howard T. Chang,
Defendants-Appellees.

No. 87-2375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1988.

Decided March 13, 1989.

Motion to Correct Opinion Granted in
Part and Denied in Part
April 6, 1989.

As Amended April 6, 1989.

As Amended on Denial of Reconsideration
July 12, 1989.

Attorney who was made subject of disciplinary proceedings following reversal of client's conviction for ineffective assistance of counsel brought civil rights action against special master and special prosecutor. The United States District Court for the District of Hawaii, Alan Cooke Kay, J., held that abstention under *Younger* was appropriate, and attorney appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) district court properly abstained from hearing attorney's constitutional challenges to enforcement of Hawaii Supreme Court Rule against him, but (2) attorney's arguments against abstention were not so frivolous as to warrant award of costs and attorney fees under Federal Rule of Appellate Procedure.

Affirmed.

Noonan, Circuit Judge, concurred and filed opinion.

Reinhardt, Circuit Judge, concurred in part and dissented in part and filed opinion.

Earle A. Partington, Honolulu, Hawaii, for plaintiff-appellant.

Susan L. Gochros, Deputy Atty. Gen., Honolulu, Hawaii, for defendants-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before WALLACE, REINHARDT and NOONAN, Circuit Judges.

WALLACE, Circuit Judge:

Attorney Partington filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court, alleging that enforcement of Hawaii Supreme Court Rule 13 against him violated the first, fifth, sixth, and fourteenth amendments to the United States Constitution. He sought a declaratory judgment stating that Rule 13 violated these constitutional provisions and an injunction barring any further proceedings against him pursuant to Rule 13. The district court concluded that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (*Younger*), was appropriate because Partington could raise these constitutional challenges in the ongoing Rule 13 proceedings. We have jurisdiction and affirm.

I

The Hawaii trial court appointed Partington as trial counsel for Clarke. The State had charged Clarke with brutally murdering the three-year-old daughter of his live-in girlfriend. Partington represented Clarke at trial. Clarke was convicted of murder and sentenced to life in prison.

Partington's appointment as counsel for Clarke continued on appeal. Clarke raised numerous contentions, but did not allege ineffective assistance of trial counsel. During the pendency of the appeal, however, the state trial judge who presided at Clarke's trial complained to the Office of Disciplinary Counsel of the Hawaii Supreme Court about Partington's failure to make a closing argument at Clarke's trial. Following this complaint, Partington filed a motion with the Hawaii Supreme Court, on behalf of Clarke, requesting that the Supreme Court remand the appeal to the trial court to explore the trial judge's complaint. The motion was denied.

During oral argument before the Hawaii Supreme Court on Clarke's criminal appeal, some Justices *sua sponte* raised the issue of ineffective assistance of trial counsel. The Hawaii Supreme Court subsequently reversed Clarke's conviction. Without addressing the numerous arguments made in Clarke's brief, the court declared that Partington rendered ineffective assistance during trial. The court based this conclusion on the following: (1) Partington refused to make an opening statement; (2) he refused to cross-examine the mother of the victim ostensibly because the State did not make certain records concerning the witness available to him; (3) he

subsequently refused to call the mother after receiving the records; (4) he elicited testimony from two State witnesses that they believed Clarke was guilty; and (5) he refused to make a closing argument. The Hawaii Supreme Court's opinion concluded: "We remind both counsel of their obligations under [Hawaii Supreme Court Rule] 13 once a judgment on appeal has been issued by us in this case."

Hawaii Supreme Court Rule 13[1] outlines proceedings that are to be brought against defense counsel following

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[1] Haw.St.Ct.R. 13 provides:

PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

> Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.
>
> Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

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the adjudication of his or her ineffective assistance in criminal cases. Under Rule 13, the Hawaii Supreme Court

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Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent himself. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the

(Continued on following page)

appoints a special master "to determine whether action against the counsel alleged to have been incompetent is

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appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 to DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

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warranted." Haw.Sup.Ct.R. 13. Within five days of this appointment, the special master notifies the defense counsel by mail. Within forty-five days of this mailing, the defense counsel must "file with the clerk of the supreme court an answer showing cause why corrective action as provided [in the Rule] should not be taken by the supreme court." *Id.* Within five days of receiving the defense attorney's answer, the special master must appoint an attorney to prosecute the proceedings. *Id.* The defense attorney and the special prosecutor then have forty-five days to conduct discovery. Within thirty days after the expiration of the discovery period, the special master holds a hearing. Within ten days after the conclusion of the hearing, the special master must render a decision and enter "an order either dismissing the proceedings or recommending corrective action against the respondent attorney." *Id.* Within twenty days of the special master's decision and proposed order, the defense attorney and the special prosecutor may file exceptions with the Hawaii Supreme Court. Within forty days of the

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> Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.
>
> Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

special master's decision and proposed order, the Supreme Court must "enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth" in the Rule. *Id.*

In accordance with Rule 13, on February 3, 1986, the Hawaii Supreme Court appointed Gedan as the special master. On February 7, 1986, Gedan notified Partington that he had forty-five days to submit an answer "showing cause why corrective action as provided for in Rule 13 should not be taken by the Supreme Court." On March 27, 1986, Partington filed an answer in accordance with the Rule. Without waiving any constitutional challenges, Partington's answer stated that he based all of his trial decisions on certain tactics, but that he could not explain his tactical choices because his client at trial, Clarke, refused to waive the attorney-client privilege.

Gedan did not appoint a special prosecutor within five days of receiving the answer as provided in Rule 13; however, on August 13, 1986, Gedan appointed Chang as the special prosecutor. Notwithstanding the time schedule set forth in Rule 13, the record does not reflect that the parties engaged in discovery during the forty-five day period as provided in the Rule or that the special master set the matter for a hearing within thirty days of the close of the discovery period.

On March 9, 1987, Partington filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of Hawaii, naming Gedan and Chang as defendants. He alleged that the conduct of Gedan and Chang pursuant to Rule 13 deprived and continue to deprive him of rights under the free speech clause of the first

amendment, the due process clause of the fifth and fourteenth amendments, the right to counsel clause of the sixth amendment, and the equal protection clause of the fourteenth amendment. The complaint sought (1) an injunction prohibiting Gedan and Chang from proceeding against Partington pursuant to Rule 13, (2) a declaratory judgment that Rule 13 as applied to Partington is unconstitutional, and (3) attorney's fees, costs, and expenses for the action. Partington also sought damages for attorney's fees and costs arising out of the Rule 13 proceeding, but later abandoned this claim. On March 30, 1987, Gedan and Chang moved to dismiss the complaint, arguing the the district court should abstain. They asserted that Partington could raise all of his constitutional claims in the Rule 13 hearing, which was scheduled to commence on April 14, 1987. The Rule 13 hearing was not held that day because Gedan stayed the hearing on Partington's request. On April 22, Partington filed a motion for summary judgment. On May 12, the Hawaii Association of Criminal Defense Lawyers (Defense Lawyers) lodged a brief in the district court on behalf of Partington as amicus curiae.

On July 1, 1987, the district court granted the Defense Lawyers' motion to file the amicus brief, granted the motion of Gedan and Chang to dismiss the complaint, and denied Partington's motion for summary judgment. The district court concluded that *Younger* abstention, as interpreted and applied in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (*Middlesex*), should be applied. After the district court entered its judgment,

Partington filed a timely notice of appeal, challenging the dismissal of the complaint.

II

Ordinarily, the dismissal of a complaint without the dismissal of the underlying action is not considered an appealable final order under 28 U.S.C. § 1291. *See Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir.1984); *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984) (*Hoohuli*). Here, the district judge abstained, but maintained jurisdiction over the cause by virtue of his failure to dismiss the underlying action. This procedure, if allowed, would grant the state permission to proceed first but allow the parties to maintain a federal court presence, if needed, after the state has finalized its assessment of the issues presented. *See Crane v. Fauver*, 762 F.2d 325, 328-29 (3d Cir.1985). We have jurisdiction over this interlocutory appeal, however, because of the denial of Partington's request for an injunction preventing Gedan and Chang from proceeding against him pursuant to Rule 13. *See* 28 U.S.C. § 1292(a)(1); *Sea Ranch Association v. California Coastal Zone Conservation Commission*, 537 F.2d 1058, 1061 (9th Cir.1976).

There is another reason why we may accept jurisdiction over this appeal. We have held that where *Younger* abstention is applicable, "a district court must dismiss the action." *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir.1987) (*World Famous Drinking Emporium*), *quoting Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir.1986). Because the district judge was required to

dismiss the action, we may assume he intended to do so and treat the dismissal of the complaint as a dismissal of the action. *See Hoohuli*, 741 F.2d at 1171 n. 1.

That brings us to our standard of review. When the district court, pursuant to the authority of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), abstains from addressing the constitutionality of a state statute because state court proceedings interpreting the statute are still pending, we review its abstention for an abuse of discretion. *C-Y Development Co. v. Redlands*, 703 F.2d 375, 377 (9th Cir.1983). But when, as here, the district court abstains on the basis of *Younger*, which forbids federal courts from enjoining pending certain categories of state proceedings except in extraordinary circumstances, we review its abstention de novo. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 (9th Cir.1984) (*Goldie's Bookstore*). This de novo review is applied even though we are reviewing the action of the district court in granting or denying an injunction. *See id.*

III

Although abstention is the exception, not the rule, *see World Famous Drinking Emporium*, 820 F.2d at 1082, *Younger* and its companion cases generally require a federal district court to abstain from granting injunctive relief when state criminal actions or certain categories of state civil or administrative proceedings are pending against the federal plaintiff at the time he or she commences the federal action. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1522, 95 L.Ed.2d 1 (1987) (*Pennzoil*) (injunctive relief against a prevailing civil litigant

attempting to execute a judgment in its favor pending appeal of that judgment to a state appellate court); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986) (*Dayton Schools*) (injunctive relief against administrative proceedings conducted by state civil rights commission); *Middlesex*, 457 U.S. at 428-29, 102 S.Ct. at 2519 (injunctive relief against state bar disciplinary proceedings); *Moore v. Sims*, 442 U.S. 415, 423, 433-35, 99 S.Ct. 2371, 2377, 2382-83, 60 L.Ed.2d 994 (1979) (*Moore*) (injunctive relief against state proceeding seeking to protect allegedly abused children); *Trainor v. Hernandez*, 431 U.S. 434, 435-38, 97 S.Ct. 1911, 1913-15, 52 L.Ed.2d 486 (1977) (*Trainor*) (injunctive relief against a state civil attachment/enforcement proceedings); *Juidice v. Vail*, 430 U.S. 327, 333-36, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977) (*Juidice*) (injunctive relief against state contempt proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-07, 95 S.Ct. 1200, 1207-09, 43 L.Ed.2d 482 (1975) (*Huffman*) (injunctive relief against state civil proceedings seeking abatement of a nuisance); *Younger*, 401 U.S. at 49-53, 91 S.Ct. at 753-755 (injunctive relief against state criminal proceedings). The *Younger* abstention doctrine is based on considerations of equity, comity, and federalism. *See, e.g., Pennzoil*, 107 S.Ct. at 1525-26; *Younger*, 401 U.S. at 43-45, 91 S.Ct. at 750-51.

A.

In applying the *Younger* doctrine, federal courts must examine (1) the nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal

relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings. *See Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521; *World Famous Drinking Emporium*, 820 F.2d at 1081, 1082. Courts must also examine whether the proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate." *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. But where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims. *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973) (*Gibson*); *compare Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975) (dictum agreeing that a biased state tribunal removes predicate for *Younger v. Harris* dismissal, but categorizing biased tribunal in *Gibson* as example of "extraordinary circumstance" rendering state tribunal incapable of fairly and fully adjudicating issues before it).

1.

Younger by its own terms requires federal courts to abstain from interfering in state criminal proceedings absent exceptional circumstances. *See* 401 U.S. at 53-54, 91 S.Ct. at 754-55. The Supreme Court, however, has never held that federal district courts should always abstain under *Younger* when state civil proceedings are pending. *See Moore*, 442 U.S. at 423 n. 8, 99 S.Ct. at 2377 n. 8; *Huffman*, 420 U.S. at 607, 95 S.Ct. at 1209. Nonetheless, the Court has held that, under *Younger*, federal courts should

abstain from interfering with state disciplinary proceedings analogous to the Rule 13 proceeding currently pending against Partington. *See Middlesex*, 457 U.S. 423, 102 S.Ct. 2515. In *Middlesex*, the Middlesex County Ethics Committee, a tribunal under the jurisdiction of the New Jersey Supreme Court, charged Hinds, a member of the New Jersey Bar, with violating two New Jersey disciplinary rules. *Id.* at 425-28, 102 S.Ct. at 2518-19. Rather than filing an answer to the charges as provided in the New Jersey Bar disciplinary procedures, Hinds filed suit in federal district court, alleging that the disciplinary rules violated his first amendment rights and were facially vague and overbroad. *Id.* at 429, 102 S.Ct. at 2519. The district court abstained under *Younger*, but was reversed by the Third Circuit. *Id.* at 429, 102 S.Ct. at 2519.

Recognizing that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved," the Supreme Court proceeded to review the New Jersey State Bar disciplinary proceedings in light of the three requirements for abstention under *Younger*. *Id.* at 432, 102 S.Ct. at 2521. First, observing that the local Ethics Committees acted as an arm of the New Jersey Supreme Court, the Court determined that "[f]rom the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee." *Id.* at 433-34, 102 S.Ct. at 2522. Significant to the Court's determination that the state disciplinary proceedings were "judicial" in nature was its analogizing of the role local ethics or bar associations to that of a special master. *Id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13. Next, the Court acknowledged that the state "has an *extremely important*

interest in maintaining and assuring the professional conduct of the attorneys it licenses," especially "the professional conduct of attorneys involved in the administration of *criminal* justice." *Id.* at 434, 102 S.Ct. at 2522 (emphasis added). Last, the Court opined that because Hinds "failed even to *attempt* to raise any federal constitutional challenge in the state proceedings," he had not shown that "the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees." *Id.* at 435, 102 S.Ct. at 2522 (emphasis in original). Having concluded that the three prerequisites for *Younger* abstention were satisfied, the Court reversed the Third Circuit, holding that it was proper for the district court to have stayed its hand in this case. *See id.* at 437, 102 S.Ct. at 2524.

The Rule 13 disciplinary proceeding initiated against Partington in Hawaii is strikingly similar to the New Jersey disciplinary proceedings at issue in *Middlesex*. Both proceedings are conducted by an ethics committee or its analogue, a special master, *id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13, under the auspices of the state supreme court. *Compare* 457 U.S. at 425-27, 433, 102 S.Ct. at 2518-19, 2522 *with* Haw.S.Ct.R. 13. Just as the Court in *Middlesex* concluded that the State of New Jersey had a "special" interest "in the professional conduct of attorneys involved in the administration of criminal justice," 457 U.S. at 434, 102 S.Ct. at 2522, we conclude that Hawaii has a vital interest in ensuring that defense counsel in criminal cases perform within the standards of reasonable professional competence. Partington concedes, as he must, that the State of Hawaii has a very important interest

in its Rule 13 proceedings. Thus, the first requirement for *Younger* abstention has been met. In addition, there is no question that the Rule 13 proceedings had begun and were still pending at the time Partington filed suit in the district court. Partington concedes this point as well. Thus, the second requirement for *Younger* abstention has been met. Unless Partington can show that, unlike the New Jersey state disciplinary proceedings discussed in *Middlesex*, the Rule 13 proceedings against him do not offer him an opportunity to raise his constitutional claims and have them timely decided by a competent state tribunal, *see Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524; *Gibson*, 411 U.S. at 573-74, 93 S.Ct. at 1695, or that this proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate," *Middlesex*, 457 U.S. at 435, 437, 102 S.Ct. at 2522, 2524, *Middlesex* governs and we must, accordingly, affirm the dismissal of this action under *Younger*.

2.

Under the third prong of the test for *Younger* abstention, federal abstention is inappropriate unless the plaintiff is afforded the opportunity in the ongoing state proceedings to raise his constitutional claims "and have [those claims] timely decided by a competent state tribunal." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697; *accord Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Partington strenuously advances two grounds why the Rule 13 proceedings against him fail to meet this third required predicate for *Younger* abstention.

First, he maintains that the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel, thereby depriving him of an opportunity to raise his federal constitutional claims during his Rule 13 proceedings. If a federal plaintiff cannot raise his federal claim in the state proceedings because state procedures do not afford him the opportunity to do so, then abstention is not appropriate. *See, e.g., Gerstein v. Pugh,* 420 U.S. 103, 108 n. 9, 95 S.Ct. 854, 860 n. 9, 43 L.Ed.2d 54 (1975). Partington argues that abstention is inappropriate here because Clarke's refusal to waive the attorney-client privilege disables him from contesting the ineffectiveness of counsel issue in either the Rule 13 proceedings or in the Hawaii Supreme Court. Partington believes that the "self-defense" exception to the attorney-client privilege, *see* Disciplinary Rule 4-101(c)(4),[2] only applies when the

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[2] Disciplinary Rules, DR 4-101, *Preservation of Confidences and Secrets of a Client,* provides:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.

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client questions the attorney's conduct. Clarke has not done so. We interpret this argument to mean that Partington believes Hawaii's interpretation of the attorney-client privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense.

Partington bears the burden of showing " 'that state procedural law bar[s] presentation of [his] claims.' "

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(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Pennzoil, 107 S.Ct. at 1528, *quoting Moore*, 442 U.S. at 432, 99 S.Ct. at 2381. Asserted ambiguities in Hawaii's rule regarding the attorney-client privilege or on the procedures available in Rule 13 proceedings for the presentation of his federal claims do not relieve him of this burden. Federal courts "cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Pennzoil*, 107 S.Ct. at 1528. Moreover, given that Partington "has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.*; *see also Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. In addition, even if a federal plaintiff cannot raise his constitutional claims in state administrative proceedings that implicate important state interests, his ability to raise the claims via state judicial review of the administrative proceedings suffices. *Dayton Schools*, 477 U.S. at 629, 106 S.Ct. at 2724. Requiring a federal plaintiff to present his constitutional challenges in the state proceedings recognizes that state courts can and will perform their responsibility to safeguard federal constitutional rights. *See, e.g., Pennzoil* 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520; *Trainor*, 431 U.S. at 443, 97 S.Ct. at 1917.

Partington has not met his burden. He does not explain how this alleged procedural bar prevents him from presenting his first, fifth, sixth, and fourteenth amendment claims in the Rule 13 proceedings. Nor has Partington unambiguously shown that Hawaii's "self-defense exception" to the attorney-client privilege, *see* DR

4-101(C)(4), *only* applies when a client attacks his attorney's conduct. *Cf.* ABA/BNA Lawyer's Manual on Professional Conduct, *Disclosure: Attorney's Benefit*, at 55:701, 703, 706-08(BNA)(Nov. 11, 1987) (discussing cases where the privilege does not apply even though the client is not attacking the attorney's conduct.) In any event, Partington "should first set up and rely upon [this procedural] defense in the [Hawaii] state courts." *Younger*, 401 U.S. at 45, 91 S.Ct. at 751, *quoting Fenner v. Boykin*, 271 U.S. 240, 244, 46 S.Ct. 492, 493, 70 L.Ed. 927 (1926). We cannot assume that Hawaii will interpret its attorney-client privilege to bar Partington from speaking in his own defense. *Pennzoil*, 107 S.Ct. at 1528.

Second, Partington argues that the third prong for abstention is not met in this case because both the special master and the Hawaii Supreme Court are biased against him. In *Gibson*, the Supreme Court recognized that if the federal plaintiff can establish that either the state administrative tribunal or the state court is not "competent" because of bias, then abstention is not appropriate. *See* 411 U.S. at 577, 93 S.Ct. at 1697. In addition, it recognized that de novo judicial review on the decision of a "biased" administrative board does not satisfy the competent tribunal requirement of the third predicate for *Younger* abstention. *See id.* & n.16. Here, Partington contends that a finding in the Rule 13 proceeding before the special master or the Hawaii Supreme Court that he rendered effective assistance of counsel would be totally incompatible with the Hawaii Supreme Court's decision in *State v. Clarke*. From this, he concludes that the issue of ineffectiveness has been prejudged against him. Partington further assails the impartiality of the Hawaii Supreme Court

by asserting that the large amount of publicity that *State v. Clarke* generated has biased the Hawaii Supreme Court against his case.

In claiming bias, Partington must overcome the presumption that the special master and the Hawaii Supreme Court are unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982). He can rebut this presumption "by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

In support of his claim of judicial bias, Partington relies on *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (*Withrow*). The Court there examined a Wisconsin statute that allowed a state medical examining board to warn and reprimand a physician, to suspend a physician's license temporarily, or to institute a criminal action or an action to revoke a license when it found probable cause under governing criminal or revocation statutes. *Id.* at 37, 95 S.Ct. at 1459. When the medical examining board commenced investigative proceedings against Larkin, Larkin filed suit in federal court under 42 U.S.C. § 1983 seeking an injunction against the investigation, which was initially denied by the federal district court. *Id.* at 39, 95 S.Ct. at 1460. The board subsequently notified Larkin that it would hold a "contested hearing" in order to determine whether to suspend his license temporarily. *Id.* at 40-41, 95 S.Ct. at 1461. The federal district court then enjoined the board because it concluded that by authorizing the board to perform a dual investigatory and adjudicative function, the Wisconsin statute raised serious procedural due process concerns by permitting a physician to lose his liberty or property at the

hands of a biased decisionmaker. *Id.* at 41-42, 95 S.Ct. at 1462.

The Supreme Court reversed the preliminary injunction, concluding that it was "quite unlikely" that the physician would ultimately prevail on his procedural due process challenge. *Id.* at 46, 95 S.Ct. at 1464. Recognizing that biased decisionmakers do not satisfy procedural due process, *id.*, at 46-47, 95 S.Ct. 1464, the Court nonetheless rejected the contention "that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Id.* at 47, 95 S.Ct. at 1464. Instead, the Court emphasized that one who advances such an argument

> must overcome a presumption of honesty and integrity in those serving as adjudicators; and [he] must convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. In repudiating the appellant's claim of presumptive bias, the Court observed that when an appellate court reverses an administrative law judge or a lower court judge, procedural due process does not mandate that a new judge retry the case. *Id.* at 48-49, 95 S.Ct. at 1465. Similarly, the Court rejected the proposition that simply because the board issued written findings of fact and conclusions of law in support of its probable cause determination, the board had prejudged the case. *Id.* 56-57, 95 S.Ct. at 1469. The Court pointed out that an initial finding

of probable cause to believe a physician had violated a statute was not logically inconsistent with a subsequent decision, based on complete evidence brought out at an adversarial hearing, that the physician did not violate the statute. *Id.* at 57-58, 95 S.Ct. at 1469-70.

Partington argues that *Withrow* stands for the proposition that bias is established where the accusatory finding is incompatible with any adjudicative finding. He relies on the statement from *Withrow* that "if the initial view of the facts based on the evidence derived from nonadversarial processes as a *practical* or *legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Id.* at 58, 95 S.Ct. at 1470 (emphasis added). From this interpretation of *Withrow*, Partington then argues that the following three factors all indicate that he is legally foreclosed from contesting the Hawaii Supreme Court's finding of ineffectiveness of counsel in *State v. Clarke*: (1) the title of Rule 13, "Proceedings Following Final Adjudication Of Ineffective Assistance Of Counsel In Criminal Cases," indicates that the decision is final; (2) the text of Rule 13, in part, speaks only of the special master determining whether "corrective action" should be taken; and (3) the Hawaii Supreme Court's order appointing the special master states that there was "a finding of ineffective assistance of trial counsel."

Under the third prong of *Younger*, Partington must demonstrate that he would not have an adequate opportunity to litigate his federal constitutional claims – in this case, as he argues, before a competent and unbiased state adjudicator. *Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521;

Gibson, 411 U.S. at 577, 93 S.Ct. at 1697.[3] He has not done so. The Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the criminal case. There is neither legal nor practical reason to believe that the Hawaii Supreme Court will be biased on this issue which it has never addressed. We cannot and should not guess how the court will respond. *Withrow* is irrelevant to Partington's unaddressed due process claims.

Moreover, we conclude that Partington has not demonstrated under *Withrow* that, as a practical or legal matter, the special master or the Hawaii Supreme Court is

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[3] The dissent suggests that we have misunderstood the third prong of the *Middlesex* test, the prong requiring that federal claimants have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. It is true that in neither *Middlesex* nor *Younger* is a biased tribunal mentioned under this third prong. The majority and the dissent agree that *Younger* abstention is inappropriate when bias renders a state tribunal incompetent; we disagree over how to categorize the Supreme Court's decision in *Gibson*. *Gibson* analyzed incompetency caused by bias in connection with the plaintiff's opportunity to litigate federal constitutional claims before a competent state tribunal. 411 U.S. at 577, 93 S.Ct. at 1697. The dissent, however, focuses on dictum in *Kugler v. Helfant* categorizing the biased tribunal finding in *Gibson* as an "extraordinary circumstance." 421 U.S. at 124-25 & n. 4, 95 S.Ct. at 1530-31 & n. 4. Despite this dictum, we believe it better to follow *Gibson's* approach of analyzing bias in connection with whether there is an opportunity to litigate the federal constitutional claims, which became the third *Middlesex* prong.

bound by *State v. Clarke* or has prejudged the ineffectiveness issue. *Cf. Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 779 & n. 10 (9th Cir.1982) (rejecting claim that a school board could not, consistent with due process, conduct an impartial hearing to review its prior decision to terminate a teacher's employment). As for the legal issue, the title of Rule 13 is somewhat troubling in that it may indicate that the finding of ineffectiveness is conclusive. Furthermore, the Rule itself is not clear on the issue of whether defense counsel can contest the issue of ineffectiveness anew before the special master and the Hawaii Supreme Court, and the Chief Justice's order appointing Gedan can be read as indicating that the Supreme Court has already decided the ineffectiveness issue. But, as we have already observed, Partington bears the burden of demonstrating, through "unambiguous authority", that both the special master and the Hawaii Supreme Court are precluded from considering the ineffectiveness issue de novo. *See Pennzoil*, 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. We do not believe that Partington has carried this burden by reciting the foregoing factors. Rule 13 states in its second paragraph that defense counsel is only "*alleged* to have been incompetent." (Emphasis added.) The special master, moreover, has the power to dismiss the proceedings. This power presumably includes the power to conclude that the criminal defense attorney did not in fact render ineffective assistance.

The Hawaii Supreme Court's initial determination of ineffectiveness will apparently not have collateral estoppel effect in the Rule 13 proceedings. *See Santos v. State Department of Transportation*, 64 Haw. 648, 652, 646 P.2d

962, 965-66 (1982) (per curiam) (discussing issue preclusion under Hawaii law). This conclusion is consistent with a letter written by the Chief Justice to Partington and others stating that Rule 13 provides "a procedure where the attorney in question ha[s] an opportunity to contest, on his own behalf, the charge of ineffective assistance of counsel, before an impartial master, who is in no way bound by the previous determination in the criminal case. . . ." If the attorney disagrees, the Rule "provides for the master's determination to be reviewed by the Supreme Court. . . ." In *Middlesex*, the Court considered the actions of the New Jersey Supreme Court clarifying Hinds's ability to raise his constitutional challenges. 457 U.S. at 436, 102 S.Ct. at 2523. Although the Hawaii Supreme Court has not formally spoken on this issue, we believe that, in the absence of clear authority to the contrary, the letter of the Chief Justice can be considered as an interpretive gloss for purposes of abstention clarifying that, as a legal matter, Partington will be able to contest the finding of ineffectiveness during his Rule 13 proceedings. In addition, the primary issue before the special master and, perhaps ultimately, the Hawaii Supreme Court, is whether corrective action is warranted under Rule 13. Partington does not contend that the court has prejudged this issue.[4]

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[4] Relying on *Gibson*, the dissent suggests that the majority has misconceived "the basic rule governing abstention and biased state tribunals" (dissent at p. 137) because we require inquiry of a biased state tribunal whether it is biased. Dissent at pp. 137-138. While we do not disagree with the legal premise, the dissent overlooks that there has been no finding that

(Continued on following page)

We also find no practical limitation on Partington's ability to address any of his arguments to an impartial tribunal. To the extent that Partington believes that certain members of the Supreme Court may be personally biased against him, either by virtue of their finding of ineffectiveness of counsel in *State v. Clarke* or as a result of the high profile nature of the publicity in that case, he may be able to file an affidavit seeking recusal under Haw.Rev.Stat. § 601-7(b) (1985).[5] *Cf. Flangas v. State Bar of*

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the Supreme Court of Hawaii is biased on the constitutional issues.

But more important, *Gibson* is distinguishable from the instant case. The state tribunal in *Gibson* was the Alabama Board of Optometry, "the statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry." 411 U.S at 567, 93 S.Ct. at 1692. This Board was comprised solely of practicing optometrists. *Id.* at 571, 93 S.Ct. at 1694. Of course, a tribunal comprised of optometrists does not have the ability to entertain constitutional claims. Optometrists are incompetent in this area; their domain is the visual process, not due process. By contrast, the state tribunal in *Partington* is a court, indeed, the Hawaii Supreme Court. It is comprised of experienced jurists. That this court has the ability to entertain and resolve constitutional claims is incontrovertible. There is simply no comparison between State Supreme Court justices and a group of optometrists in their competency to face constitutional issues: Justices are competent, optometrists are not. Partington has failed to demonstrate that he will not be afforded the opportunity to litigate his constitutional claims before a competent state tribunal. The third prong of *Middlesex* requires us to abstain. Contrary to the dissent's assertion, *Gibson* does not dictate a different result.

[5] Haw.Rev.Stat. § 601-7 provides:

> (a) No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity

(Continued on following page)

Nevada, 655 F.2d 946, 950 (9th Cir.1981) (holding that this court cannot ascertain the availability of the biased adjudicator exception to *Younger* abstention until appellant attempts to avail himself of state statutory procedures to disqualify allegedly biased supreme court justices). Hawaii provides that Hawaii circuit judges and retired Supreme Court Justices may sit on the Hawaii Supreme Court when one of the Justices recuses himself. *See*

(Continued from previous page)

within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decision or judgment rendered by the judge.

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

Haw.Rev.Stat. § 602-10 (1985).[6] The statute even contemplates that some cases may arise in which all five Supreme Court Justices would recuse themselves, *id.* Moreover, we must presume that each Hawaii Supreme Court Justice will follow his duty under Haw.S.Ct.R. 5 to "be unswayed by partisan interests, public clamor, or fear of criticism," Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct, Canon 3(A)(1), and to recuse himself if "he has a personal bias or prejudice concerning a party. . . ." Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct,

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[6] Haw.Rev.Stat. § 602-10 provides:

> Parties shall be entitled to bring an appeal before a full court. Oral argument shall be before a full court; provided that in an appropriate case the court in its discretion may dispense with oral argument. In case of a vacancy, or if a justice of the supreme court is disqualified from sitting in any case pending before this supreme court, or is unable to attend, or is absent, or is recused or has been excused, the vacancy or the place of such justice may be temporarily filled by a circuit judge designated by the chief justice or by the appointment of a justice who has retired from the supreme court. Such retired justice chosen to serve as substitute justice shall not be actively engaged in the practice of law. A retired justice, when sitting as substitute justice, shall be compensated at a rate of pay of associate justices of the supreme court. When necessary, the court may consist of five circuit judges, so designated or five retired justices so appointed or any combination of circuit judges and retired justices. After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice.

Canon 3(C)(1)(a). Partington has provided no reason to strip these individuals of the "presumption of honesty and integrity." *See Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.[7]

B.

Even if the necessary three predicates exist, however, *Younger* abstention will not be appropriate if the federal plaintiff can establish (1) that the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) that some other "extraordinary circumstances" exist, such as proceedings pursuant to a "flagrantly" unconstitutional statute. *See, e.g., Younger*, 401 U.S. at 49-50, 53-54, 91 S.Ct. at 753, 754-55.

1.

The scope of *Younger*'s bad faith exception is not clear. Although the Court in *Younger* and its progeny has continuously recognized that abstention would not be required if a federal plaintiff could establish that the state court proceedings were instituted in bad faith, the Court has never actually applied the exception. Federal circuit courts, however, have occasionally found that "bad faith" exception applicable. *See, e.g., Rowe v. Griffin*, 676 F.2d

[7] The dissent draws attention to language in the Chief Justice's April 27, 1987, letter to Partington which, the dissent suggests, indicates that the Chief Justice has prejudged Partington's due process and equal protection claims. Dissent at p. 138 n. 8 & p. 144 n. 24. The Chief Justice is at liberty to recuse himself if his impartiality or the appearance of judicial objectivity is drawn into question.

524, 525-26 (11th Cir.1982); *Heimback v. Lyons*, 597 F.2d 344, 346-47 (2d Cir.1979) (per curiam); *Wilson v. Thompson*, 593 F.2d 1375, 1381-83 (5th Cir.1979). No bad faith has been demonstrated in this case.

2.

Because "[t]he very nature of 'extraordinary circumstances' . . . makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings," *see Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530, 44 L.Ed.2d 15 (1975), the scope of *Younger's* "exceptional circumstances" exception is also unclear. As with the bad faith exception, the Supreme Court has consistently recognized the exception, but has never held that the exception applied.

The exception clearly recognizes, however, that a federal court need not abstain when faced with a flagrantly unconstitutional statute. *See Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55. This aspect of the exception applies only when a statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Id., quoting Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941) (*Watson*); *accord Trainor*, 431 U.S. at 446-47, 97 S.Ct. at 1919.

Partington argues that Rule 13 flagrantly violates the first amendment, procedural due process, and the equal protection clause of the fourteenth amendment on its face

and as applied. We have examined the arguments that Partington makes in challenging Rule 13. He has certainly raised some colorable constitutional arguments. Nonetheless, he has failed to demonstrate that Rule 13 is " 'patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55, *quoting Watson*, 313 U.S. at 402, 61 S.Ct. at 967. Therefore, we reject Partington's argument that this exception prevented the district court from abstaining.

IV

Partington also contends that the Hawaii Supreme Court's decision in *State v. Clarke* (1) violated the first amendment because the decision had a chilling effect on his ability to hold himself out as a competent counsel, (2) violated the fifth and fourteenth amendment because the decision deprived him of a liberty and property interest in his reputation without due process of law, and (3) violated the sixth amendment which he argues "necessarily includes a corresponding right of a criminal defense attorney to practice his profession without unreasonable hindrances." Partington believes that both the fifth amendment and the sixth amendment require courts to grant a "pre-deprivation" hearing to all defense counsel alleged to have rendered ineffective assistance and that the Hawaii Supreme Court, in deciding *State v. Clarke* did not comply with these constitutional requirements. Partington argues that the special master lacks the power to analyze these issues or to undo these constitutional harms and that it is unreasonable to believe that

the Hawaii Supreme Court will analyze these issues or undo these harms; therefore, abstention is not appropriate. Accordingly, Partington requests a declaratory judgment stating that in rendering its decision in *State v. Clarke* and concluding that Partington rendered ineffective assistance of counsel, the Hawaii Supreme Court violated the first, fifth, and sixth amendments.

The district court did not expressly address any of these arguments or the requested declaratory relief regarding the Hawaii Supreme Court's decision in *State v. Clarke*. At oral argument, we expressed doubt whether Partington presented these constitutional challenges in the district court concerning the manner and the effect of the Hawaii Supreme Court's decision in *State v. Clarke*. We pointed out that the prayer for relief in Partington's complaint did not request a declaratory judgment that in rendering its decision in *State v. Clarke* the Hawaii Supreme Court violated the first, fifth, and sixth amendments. Rather, the complaint states that because of the defendants' action he "is entitled to . . . [a] declaratory judgment that HSCR 13 as applied to Plaintiff is unconstitutional." At oral argument, Partington contended that his request for declaratory relief in the context of Rule 13 included the first, fifth, and sixth amendment challenges to the Hawaii Supreme Court's decision in *State v. Clarke*. He claims that he couched his request for relief in terms of Rule 13 because the Hawaii Supreme Court's decision in *State v. Clarke* was the "first step" under Rule 13. He argued that even if his complaint was not totally clear on the requested relief, his brief in the district court made his argument concerning the Hawaii Supreme Court's decision in *State v. Clarke* clear.

Gedan and Chang denied that Partington had presented this challenge in the district court. They contend not only that it would be inappropriate to allow Partington to bypass the district court, but also that such an attack on *State v. Clarke* implicates the *Rooker-Feldman* doctrine forbidding lower federal courts to sit in direct review of state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 1314-16, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *see also Mackay v. Pfeil*, 827 F.2d 540, 543-45 (9th Cir.1987) (per curiam); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-93 (9th Cir.1986) (*Worldwide Church of God*).

We have reviewed Partington's complaint and the brief he submitted to the district court. Although we might be able to read Partington's rather unclear brief as contesting the constitutionality of the Hawaii Supreme Court's decisionmaking process in *State v. Clarke*, his complaint merely sought declaratory and injunctive relief against the defendants – Gedan and Chang – involved in the Rule 13 proceedings. Thus, the lack of clarity in his brief and the wording of his complaint lead us to conclude that he did not clearly raise the issue in the district court.

Ordinarily, we will decline to review an issue not clearly raised in the district court unless necessary to prevent manifest injustice, unless a new issue arises while the appeal is pending because of a change in the law, or unless the issue is purely one of law that is both central to the case and important to the public and the necessary facts are fully developed. *See Romain v. Shear*, 799 F.2d

1416, 1419 (9th Cir.1986) (per curiam), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 840 (1987); *Yuchert v. Heckler*, 774 F.2d 1365, 1367 (9th Cir.1985), *rev'd on other grounds*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). Even if one of these exceptions apply, we retain discretion to decline to address the issue.

We decline to review on this appeal Partington's attack on the Hawaii Supreme Court's decisionmaking process and judgment in *State v. Clarke*. The arguments implicate the *Rooker-Feldman* doctrine and neither party has briefed this significant issue. *Cf. Worldwide Church of God*, 805 F.2d at 893 n. 4 (noting that the *Rooker-Feldman* doctrine applies to section 1983 actions).

V

Gedan and Chang requested costs and attorney fees pursuant to Fed.R.App.P. 38. Under Rule 38, we may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir.1987) (citation omitted). Gedan and Chang contend that Partington's attempts to distinguish *Middlesex* were frivolous.

In response to this request for costs and attorney fees, Partington requested sanctions pursuant to Fed.R.Civ.P. 11 against Gedan and Chang for their request for costs and attorney fees. The Defense Lawyers joined Partington's request for sanctions.

We have power to sanction Gedan and Chang pursuant to Rule 11. *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United*

States Aircraft Insurance Group, 823 F.2d 302, 304-05 (9th Cir.1987); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986).[8] Though Gedan and Chang's request for Rule 38 sanctions appears in their opening brief, we consider their request as a separate motion to this court, severable from the balance of the brief.

The Seventh Circuit's discussion of a request for sanctions under Fed.R.App.P. 38 is particularly appropriate. The court limited its opinion to the defendant's request for attorney's fees under Rule 38. The court stated:

> The plaintiff's appeal, although not meritorious, is plainly not frivolous; it is the defendant's request for Rule 38 sanctions that is

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[8] The dissent suggests that Rule 11 is not a proper basis for imposing sanctions against Chang and Gedan. Conceding that this court has sanctioned attorneys pursuant to Rule 11, the dissent maintains that in each case the sanctionable conduct occurred in the district court. Dissent at 35 & n. 34. The dissent is mistaken. *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), held that:

> Curl's excuses do not relieve him of responsibility for having *brought an appeal* that should not have been brought, for subjecting Harvester to the burden of appellate litigation, and for having put this court to the task of *reading, analyzing, and judging his baseless arguments*. . . .The *brief* filed by Curl was not well-grounded in fact and he had not made reasonable inquiry.

Id. (emphasis added). Contrary to the dissent's assertion, dissent at 35 n. 34, *In re Curl* is not ambiguous. This court sanctioned Curl for much more than filing a frivolous notice of appeal in district court; we sanctioned him for conduct occurring in the appellate court.

> frivolous. We are troubled by the frequency with which lawyers in this court, whether representing appellants or appellees, are including in their briefs groundless requests for Rule 38 sanctions. The attitude seems to be, it can't hurt to ask. It can. Any frivolous motion, pleading, or request is subject to sanctions, including a motion or request for sanctions. *In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir.1987). We remind the bar that sanctions will be forthcoming if counsel routinely request Rule 38 sanctions without careful investigation to determine that the appeal or defense sought to be sanctioned is indeed frivolous. *See also Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir.1987).

Meeks v. Jewel Co., 845 F.2d 1421, 1422 (7th Cir.1988) (per curiam) (*Meeks*). We believe that *Meeks* fully applies to the request for attorneys' fees and costs by Gedan and Chang.

Far from being frivolous, Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent, although not ultimately meritorious. The arguments required us to examine closely the Rule 13 proceedings and interpret whether Partington would be able to raise his serious constitutional challenges to Rule 13 in the Rule 13 proceedings before the special master and, if necessary, on appeal to the Hawaii Supreme Court. Moreover, we fully expect that the special master and the Hawaii Supreme Court will examine carefully and seriously Partington's allegations that Rule 13 violates the first amendment free speech clause as incorporated by the fourteenth amendment, the fifth amendment guarantee of procedural due process as

incorporated by the fourteenth amendment, and the fourteenth amendment equal protection clause, both on its face and as applied. All of these issues are important and will require careful and detailed examination. To charge that these issues are frivolous is surprising – to claim Rule 38 sanctions for Partington's bringing them to our attention is the vice described by the Seventh Circuit in *Meeks*.

We deny the request by Gedan and Chang for Rule 38 sanctions and grant the Rule 11 request by Partington and the Defense Lawyers. We order Gedan and Chang to pay Partington's and the Defense Lawyers' costs and attorneys' fees incurred in responding to the motion for Rule 38 sanctions. The district court is instructed to determine the amount of the sanction.

AFFIRMED.

NOONAN, Circuit Judge, concurring:

I concur in the opinion of the court and note that the foundation of the dissent is that the Hawaii Supreme Court "is, as a matter of law, biased against Partington." I do not find it so easy to reach the dissent's conclusion in the light of what, in terms of current law and history, has constituted a biased tribunal. The ideal has always been an absolutely impartial judge. In practice, the ideal has been tempered by the qualification put by the old Constitution of Massachusetts which guaranteed a judge "as impartial as the common lot of humanity will admit." Constitution of Massachusetts, Part 1, Declaration of the Rights of the Inhabitants (1780). What the common lot of humanity will admit has varied.

A leading recent case from this circuit is *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Here a panel consisting of Circuit Judges Kennedy and Tang and District Judge Palmieri considered a criminal appeal by Joseph Conforte, the operator of a legalized house of prostitution in Nevada. The district judge who had presided at his trial had, as president of the Reno Unit of the American Contract Bridge League, participated in the decision to reject Conforte's application to join the League because of his prior convictions and proprietorship of the house of prostitution. At a cocktail party in 1973 the judge had also advised against accepting a contribution from Conforte for the University of Nevada football team. The judge had remarked the Conforte ran a house of prostitution and "was not good for Reno." *Id.* at 879.

District Judge Warren J. Ferguson heard Conforte's motion for a new trial on the grounds of the district judge's bias and found that the district judge had not been disqualified. *United States v. Conforte*, 457 F.Supp. 641 (D.Nev.1978). Upholding this ruling, Judge Kennedy for the panel stated: "We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. . . .[T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind – [that evinces] an aversion or hostility of a kind or degree that a fair minded person could not entirely set aside when judging certain persons or causes." *Conforte*, 624 F.2d at 881.

This standard, it is apparent, is such that a previous legal ruling would not constitute disqualifying bias because it is not the kind of aversion or hostility that a

fair-minded person would be unable to set aside. Specifically, at a later point in the opinion, the panel held: "A judge's view on legal issues may not serve as the basis for motions to disqualify." *Id.* at 882 (citations omitted).

The history that lies behind this treatment of disqualifying prejudice as a term of art is worth reviewing. The Judiciary Act of 1789 provided that district judges should not review their own decisions on appeal to the circuit courts, but at the same time provided that Supreme Court Justices should regularly act as circuit judges and made no provision for disqualifying them from reviewing their own decisions. In 1790 Chief Justice John Jay composed a letter to be sent by the entire Supreme Court to President Washington on this problem. Jay pointed out that having once decided an issue, a justice would not be

> secured against the influence of those predilections for individual opinions, and of those reluctances to relinquish sentiments publicly, though, perhaps, too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.

Letter from John Jay to James Iredell (Sept. 15, 1790) (enclosing draft), *reprinted in* 2 G. McRee, *Life and Correspondence of James Iredell* (1857). Jay also alluded to the case where a justice might disqualify himself from sitting on his own decision but the public would still believe that in the decision of the Supreme Court reviewing his decision, "mutal interest had generated mutual civilities and tendernesses injurious to right." *Id.* Chief Judge [sic] Jay observed that appellate cases were usually doubtful with "much appearance of reason on both sides"; it would shake the confidence of the losing litigant and the public

if the court in reaching such difficult questions appeared to be biased by the pre-judgment made by one or more of it members.

It is unclear whether any other justice signed Chief Justice Jay's letter. It was never sent. 1 J. Goebel, Jr., *History of the Supreme Court of the United States*, 556 (1971). The Supreme Court did not hesitate to act as a court of appeals from decisions of circuit courts made by the Justices as circuit judges. When in 1803 the practice was finally challenged by a litigant, the Court held that acquiescence in the practice prevented change. *Stuart v. Laird*, 1 Cranch 299, 309 (1803). The practice of judging appeals from one's own decisions continued in the Marshall court. *E.g., The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825).

It could not be much clearer that the Founders and the early Supreme Court did not believe that a judge was biased as a matter of law because he had previously ruled on the question being presented to him. Eventually by statute the practice ceased in 1891. Judiciary Act of March 3, 1891, ch. 517, 26 Stat. 826, § 3. But the problem has scarcely disappeared. It is the regular practice of the circuit courts of appeal to schedule sessions en banc in which panel members, who have previously heard the case, sit as members. The session is called a "rehearing" but the reality is that the reargument before the en banc court is a fresh hearing. Often there is new briefing and always there is new oral argument. There are always judges sitting who have never heard the case before. At the same time the judges on the en banc panel who have heard the case the first time and decided it are not

regarded as biased as a matter of law in sitting to judge this fresh appeal.

One difference exists between these practices and the case Partington presents. At least in the practices mentioned a party has had an opportunity to defend himself before the judge who ruled against him the first time, whereas Partington suffered an adverse ruling in a case where he had no possibility of defending himself. This distinction, however, is not material if the question is one of prejudice on the part of the judge. In the federal practices mentioned and in the Hawaii case the judges at one point have made up their minds. In the most literal sense they are prejudiced judges: they have prejudged the case now before them. In the federal practices it was and is assumed that they can unmake their minds and consider the case afresh. Why should this assumption not be the case in Hawaii?

When a litigant was, for the first time, permitted to challenge a federal judge on the grounds of bias, it was on the basis of a statute enacted in 1911. The challenge could only be for "personal bias or prejudice." Act of March 3, 1911, ch. 231, 36 Stat. 1090, § 21. Interpreting this statute, the Supreme Court said that the party seeking to disqualify the judge must "state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice." *Ex Parte American Steel Barrel, Co. and Seaman*, 230 U.S. 35, 43-44, 33 S.Ct. 1007, 1009-10, 57 L.Ed. 1379 (1913). Applying the statute to disqualify District Judge Keneshaw Mountain Landis in 1921, the Court observed that the bias "must be based upon something other than rulings in the case." *Berger v.*

United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). In *Denis v. Perfect Parts*, 142 F.Supp. 263 (D.Mass.1956), Judge Bailey Aldrich had ruled in a previous case that the patent in question was valid. When the same patentee brought a case against a different defendant, the defendant objected that Judge Aldrich was prejudice because he had already ruled on the validity of the patent. Judge Aldrich refused to disqualify himself, ruling, "The statute is directed to personal bias, not to previous judical exposure to the same or similar questions." *Perfect Parts*, 142 F.Supp at 263. The general standard that the bias must be personal and also arise from an extrajudicial source has been stated as the law of this circuit. *United States v. Carignan*, 600 F.2d 762, 763-64 (9th Cir.1979). A judge's participation in a "related or prior proceeding" is not sufficient even though he ruled against one of the present parties in that earlier proceeding. *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir.1981). The dissent appears unwilling to acknowledge that as the law now stands a prior adverse ruling by a judge does not show the judge to be biased.

The point could be raised that the Justices of the Hawaii Supreme Court might be prejudiced because of the publicity attending the reversal in the *Clarke* murder case. The fact of publicity generated by a judge's prior ruling was considered at length in the Watergate case where the defendants included John Ehrlichman, Bob Haldeman and John Mitchell. The Court of Appeals for the District of Columbia, sitting en banc, rejected the defendants' contention that Judge John Sirica had been biased against them because his "public image and reputation" had "become inextricably intertwined with the

prosecution of the Watergate matter." *United States v. Haldeman*, 559 F.2d 31, 137 (D.C.Cir.1976), *cert. denied sub. nom., Ehrlichman v. U.S.*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The court held that this kind of "interest" on the part of the judge was not disqualifying. Interest in order to disquality must emanate from extrajudicial sources, otherwise "the prohibition would have has a reach far beyond anything Congress could rationally have contemplated." *Id.* The court refused to hold that Judge Sirica had been impermissibly biased. *Haldeman* was favorably cited by Judge Kennedy in *Conforte*, 624 F.2d at 882.

Sensibilities no doubt are changing on the question of judicial bias. In 1765 Blackstone could write: " . . . the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea," 3 W. Blackstone, *Commentaries on the Laws of England* *361. While recusal on the basis of challenge by a litigant has existed in Roman law, canon law, and early English law, it had disappeared by Blackstone's time, *id.*, and was permitted in federal law only in 1911. Since that turning point there have been other signs that judicial disqualification may be looked at more sharply. For example, Judge Aldrich's decision in *Perfect Parts* was criticized by a student writer. Note, "Disqualification of Judges for Bias in the Federal Courts," 79 *Harv.L.Rev.* 1435, 1451 (1966). In 1974 Congress enacted the statute requiring judges to disqualify themselves if a reasonable person could doubt their impartiality. 28 U.S.C. § 455(a). The practice of the Supreme Court in its first century in relation to circuit decisions now looks strange to us. It

may be that the time will come when the participation of panel judges in en banc circuit hearings will appear an impermissible breach of impartiality. It may happen even that prior ruling on a matter will disqualify a judge from sitting on another case involving the same issue. But it is still generally recognized that it is difficult to lay down an absolute rule disqualifying a judge because he has ruled against a litigant in an earlier context. Note, *supra* at 1452. What due process requires is being worked out case by case. Given the history and the current state of law, the federal courts should give the Hawaii Supreme Court a chance to decide what due process requires.

In making that decision, a Justice of the Hawaii Supreme Court will be asking, "Have I so made up my mind by my earlier ruling in the criminal case that I cannot give a fair hearing to Partington's explanation of why he thought his strategy was appropriate?" and "Will public confidence in the courts be diminished if I, a justice who's already found Partington to have given ineffective assistance, now sit on a case where he is defending himself against this charge?" A federal court is not in a position to anticipate how a justice of the Hawaii Supreme Court will answer those questions.

The dissent places weight on a statement in *Withrow*, upholding a procedure in which a later acquittal by the administrative body concerned would not be "logically inconsistent" with a prior finding of probable cause. *Withrow v. Larkin*, 421 U.S. 35, 57, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712 (1975). There would, however, be no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary

proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer. The question of sixth amendment deprivation, decided in *Clarke*, is logically distinct from the disciplinary standards which Partington must meet to satisfy the Bar.

The dissent also places emphasis on the "practical" probability of prejudice. But the dissent admits that a judge may charge an attorney with violating Fed.R.Civ.P. 11, order him to show cause, conduct a subsequent hearing, and find against him. The dissent also admits that a court may cite an attorney for contempt of court, order him to show cause, and then preside over the contempt trial and find against him. As a practical matter, the probability of a judge in these circumstances having in mind a vivid impression of the professional breach of the lawyer, and being influenced by this impression, is much greater than the probability of an appeals court, months or years after the initial decision that occasioned the reference of the lawyer to disciplinary proceedings, being still prejudiced against the lawyer. The dissent is on treacherous grounds when it argues that practical prejudice is more likely in Partington's case that in the cases it accepts as routine judicial practice.

Judges have not been particularly good at recognizing their own biases. The major federal reforms have been made by the legislature – the elimination of Supreme Court Justices reviewing their own decisions in 1891; the introduction of recusal motions by litigants in 1911; the reasonable person test of objectivity in 1974.

This history suggests the need for heightened self-scrutiny. The impartiality that "the common lot of humanity will admit" is now closer to the ideal.

REINHARDT, Circuit Judge, concurring and dissenting.

I concur only in the order set forth at the end of part V of the majority opinion which awards certain costs and attorneys' fees to Partington and the Defense Lawyers. I dissent from the rest of Part V and all of Parts I through IV.

I do not believe that this is one of those exceptional cases in which *Younger* abstention is required. *See World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987). Rather, I believe we should now decide that by virtue of its prior decision in *State v. Clarke*, the Hawaii Supreme Court is biased against Partington on the issue whether he rendered ineffective assistance of counsel and that its holding of a disciplinary hearing would violate his due process rights. After applying the three-part test from *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), the majority concludes that *Younger* abstention is applicable. The majority would permit the Hawaii Supreme Court to resolve the question of its own bias. It reaches this conclusion solely on the basis of its reading of the third part of the *Middlesex* test. As the majority describes that part of the test, the plaintiff must be able "to litigate his federal constitutional claims . . . before a competent and unbiased state adjudicator." Majority op. at 125. Because the majority concludes that

the Hawaii Supreme Court may not be biased on the "constitutional question", it opts for abstention.

The majority misconceives the third part of the *Middlesex* test. Bias plays no role in the application of the three-part test. Rather, bias is an entirely separate matter. Where bias exists, *Younger* abstention is inapplicable, regardless of whether the three-part test is met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975). The bias need not be on any particular claim. All that is necessary to bar abstention is that the Hawaii Supreme Court be biased on the disciplinary proceedings. Here, under Hawaii Supreme Court Rule 13, the supreme court would have to determine whether Partington rendered ineffective assistance of counsel to Clifford Clarke. However, that court has already decided in *State v. Clarke* that Partington's assistance *was* ineffective and that a murder conviction against Clarke must be reversed for that reason.[1] Thus, Partington would be subjected to judgment by a tribunal which has already reached a judgment *on the merits* of his case.[2] Because of its prior actions, the Hawaii Supreme Court is, as a matter of law, a biased forum with respect

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[1] At the oral argument in *State v. Clarke*, one of the justices of the Hawaii Supreme Court accused Partington of misconduct, contending that he had been deliberately ineffective at trial. As discussed in the text, the Hawaii Supreme Court ultimately reversed Clarke's conviction on the grounds that he received ineffective assistance from Partington.

[2] Subjecting Partington to disciplinary proceedings before a biased tribunal would violate his due process rights. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973).

to the Partington proceedings and the federal courts need not abstain.

The majority offers recusal of all of the justices of the Hawaii Supreme Court as a solution to the prejudgment problem. However, the structure of Rule 13 makes it clear that recusal of the entire court is not an available option in this case. Rule 13 was specifically designed to ensure that the justices of the supreme court would make the final determination of ineffective assistance, not a different group of judges. Recusal of the entire court in cases like Partington's would run directly contrary to the language and intent of the rule.

My conclusion that the Hawaii Supreme Court is biased against Partington is not meant to disparage the members of the court. They are undoubtly able individuals and are entitled to a presumption of honesty and integrity. They have no adverse pecuniary interest. Nevertheless, other "[c]ircumstances and relationships must be considered." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue. The disciplinary proceedings must "satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). In *State v. Clarke*, the justices concluded that the legal assistance Partington provided Clarke was ineffective, the very determination they would be called upon to make again in the Rule 13 proceedings. For this reason, a "realistic appraisal of psychological tendencies and human weakness" compels the conclusion that the Rule 13 proceedings involve an intolerably high risk of bias or prejudgment by the Hawaii

Supreme Court. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Under these circumstances, abstract principles of comity, *Younger v. Harris*, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), as important as they are, do not bar a federal court from exercising its jurisdiction.

In my view, we would not only be performing our duty as a federal court properly, but would be saving the Hawaii Supreme Court the expenditure of much unnecessary time and effort were we to declare Rule 13 unconstitutional now. I see little choice for the Hawaii court when Partington's case reaches the justices. If they fail to invalidate the rule, certainly the federal courts will ultimately be required to do so.

I

RULE 13

Hawaii Supreme Court Rule 13 provides a procedure for determining whether a defense attorney should be disciplined for providing ineffective assistance of counsel. Under the rule, whenever a criminal conviction has been overturned on that ground by either the supreme court or the intermediate appellate court[3], the supreme court appoints a special master to decide whether action against the attorney is warranted. The special master, in turn, appoints a special prosecutor. At the conclusion of the proceedings, the special master dismisses the proceedings or recommends to the supreme court that corrective action be taken against the attorney. Both the

[3] See note 28, *infra*.

attorney and the special prosecutor may file exceptions to the special master's decision with the court. The supreme court reviews the special master's decision; the Court then makes an independent determination[4] whether the attorney provided ineffective assistance to the defendant and on that basis decides whether to dismiss the proceedings or order corrective action against the attorney.

II

PREJUDGMENT

Clearly, the critical feature of the Rule 13 proceedings is the determination of the Hawaii Supreme Court is required to make with respect to counsel's ineffectiveness. It must make this critical determination regardless of whether it or the intermediate appellate court made the earlier determination that counsel's representation was ineffective, and reversed the criminal conviction on that ground. Here, we are presented with an extreme form of the Rule 13 process: the supreme court, *sua sponte*, raised and determined the ineffectiveness issue during the criminal proceeding; it would now be required to resolve the identical issue a second time in the disciplinary proceeding.

The majority first asserts that *Younger* abstention is appropriate here because "[t]he Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the

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[4] See note 12, *infra*.

criminal case. . . .We cannot and should not guess how the court will respond." Majority op. at 126. Thus, the majority apparently takes the position that Partington must demonstrate not only that the Hawaii Supreme Court has prejudged the merits of the disciplinary proceeding but also that the court has prejudged the issue of *whether* it has prejudged the merits of that proceeding.

The majority's argument misconceives the basic rule governing abstention and biased state tribunals. The fundamental principle is that compelling an individual to present his case to a biased tribunal offends due process and federal courts will enjoin such an unconstitutional proceeding. *Gibson v. Berryhill*, 411 U.S. 564, 570, 577, 93 S.Ct. 1689, 1693, 1697, 36 L.Ed.2d 488 (1973). When a federal claimant alleges that a state adjudicator is biased, it is the federal court which determines whether that allegation is correct. *See Gibson*, 411 U.S. at 578-79, 93 S.Ct. at 1697-98; *see also Kugler v. Helfant*, 421 U.S. 117, 125, 127-28, 95 S.Ct. 1524, 1531, 1532, 44 L.Ed.2d 15 (1975). The question is not referred to the state court. If the federal court concludes that bias exists, the finding of a due process violation follows automatically. *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697.[5] No more is required. The federal court does not abstain.[6] In short, abstention

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[5] *Cf. Kugler*, 421 U.S. at 128, 95 S.Ct. at 1532 (framing the abstention issue as whether the "judicial system provides procedural safeguards to guarantee that [the federal court plaintiff] *will not be denied due process of law* in the state trial or appellate process") (emphasis added).

[6] An exception exists where the state provides an alternate procedure which ensures a fair tribunal in place of the biased

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doctrine does not require a person to ask a tribunal that is biased on the merits of his case whether it is in fact biased. Nor must that person ask the biased tribunal whether the fact that it is biased would violate the due process clause. Clearly, it would – as a matter of federal constitutional law, and a federal injunction, not abstention, is the appropriate remedy.

Indeed, the parallel between Partington's situation and the one considered by the Supreme Court in *Gibson* is striking. *Gibson*, like the present case, was a disciplinary proceeding (license revocation) before a body that was allegedly biased on the revocation issue. Thus, the licensee faced a potential due process violation. Notably, in *Gibson*, the Court did not inquire into whether the state licensing agency was biased on the question of the validity of the challenged statutory procedure. Rather, it considered only the question whether the agency was biased as to "the revocation of appellees' licenses." 411 U.S. at 578, 93 S.Ct. at 1697. Moreover, it held irrelevant the fact that the state courts would review the revocation proceeding de novo. *Id.* at 577, 93 S.Ct. at 1697. Finally, the fact that petitioners had not sought to invalidate the unconstitutional state procedure in the available and unbiased state court forum did not deter the Court from affirming the district court's action enjoining the state proceeding. Procedurally, our case and *Gibson* are identical. In my opinion, *Gibson* is controlling here. If the

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tribunal, *e.g.*, by way of recusal. *See Kugler v. Helfant*, 421 U.S. 117, 127-128, 95 S.Ct. 1524, 1532, 44 L.Ed.2d 15 (1975). The applicability of the recusal exception is discussed in Section III, *infra*.

Hawaii Supreme Court is biased as to Partington's disciplinary issues, the result here should be the same as in *Gibson*; we should not abstain.

The majority attempts to distinguish *Gibson* on the basis that "a tribunal comprised of optometrists does not have the ability to entertain constitutional claims." Majority op. at 127 n. 4. This is not a material distinction. In deciding that *Younger* abstention was inappropriate, the Supreme Court did not even mention the fact that "a tribunal composed of optometrists" cannot hear constitutional claims, let alone rely on that fact (if indeed it is a fact).[7] Rather, the Court found *Younger* abstention unwarranted simply because the state tribunal (composed of optometrists or not) was biased *on the revocation issue*. No more was required to be shown in *Gibson*; no more should be required here. This point can not be overemphasized. If, as appears clear, the Hawaii Supreme Court is biased as to the merits of Partington's disciplinary proceeding, that tribunal is not competent to hear that proceeding – regardless of whether non-merit issues may be raised

[7] I must confess that I do not know whether the majority's description of the powers possessed, in 1973, by the Board of Optometry under Alabama law is correct. In California until a few years ago, administrative agencies, including licensing boards, *did* have the power (and the duty, I believe) to make rulings on constitutional issues. This was so regardless of whether the board was an industry board or an industry-labor board, composed exclusively of laymen, or some other type of board. The Attorney-General's office provided advice to all these boards on constitutional questions and the boards then made their rulings. Long after 1973, the voters of California adopted an initiative measure removing from all administrative boards, including those composed of lawyers, the power to declare statutes unconstitutional.

during that proceeding, or whether the court is or is not biased as to any of those non-merit issues.

Conversely, the majority asserts that *Younger* abstention is required here because the Hawaii Supreme Court "has the ability to entertain and resolve constitutional claims." Majority op. at 127 n. 4. In essence, the majority appears to be contending that it is proper to force an individual to appear before a biased tribunal in a disciplinary proceeding, so long as that tribunal could conceivably avoid reaching the merits of the proceeding. My reading of *Gibson* leads me to the contrary conclusion. An individual can *not* be summoned before a biased tribunal when the primary issue before the tribunal is the very issue on which it is biased. It is fundamental that compelling an individual to present his case to a biased tribunal offends due process. *Gibson*, 411 U.S. at 570, 577, 93 S.Ct. at 1693, 1697. An individual required to appear before a state tribunal that is biased on the merits of the proceeding may resort directly to federal court, whether or not the state tribunal has the authority to dismiss the proceedings for bias, lack of jurisdiction, or on any other grounds.[8] As *Gibson* illustrates, the fact that there are state remedies for resolving or determining the fairness of the procedure is irrelevant, regardless of when or in what state forum that determination could be made.

[8] Where state law provides that a biased judge must recuse himself, the state law does *not*, of course, require the individual to appear before a biased tribunal (except, possibly, in some instances for the limited purpose of filing the disqualification motion). The question of recusal is discussed in Section III, *infra*.

In *Gibson*, the Supreme Court stated explicitly that *Younger* abstention is not required "simply because [state] judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings." 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). Moreover, it is clear that the federal court plaintiff in *Gibson* had a completely unbiased state court system in which to seek injunctive relief prior to the administrative proceedings and thus had perfectly adequate state court remedies for his due process claims. For example, he could have asked a state trial or appellate court, rather than a federal district court, to enjoin those proceedings. An unbiased state court is, as the majority points out, generally presumed to be as capable as a federal court of protecting federal constitutional rights. Nevertheless, the Supreme Court in *Gibson* did not require the plaintiff, to first seek relief in state court. Rather, he was permitted to go directly to *federal* court to obtain the appropriate remedy – a federal court injunction against the proceedings in the biased state forum.

The only difference between the facts and circumstances of *Gibson* and those in this case (other than the distinction previously discussed) is that in *Gibson*, the state provided *both* an entirely unbiased state court review of the unconstitutional proceedings *and* an unbiased state court system in which to seek an injunction against the unconstitutional proceedings, while here, there is *neither* an entirely unbiased state forum in which Partington could seek injunctive relief before the unconstitutional proceedings are held *nor* one in which he

could do so afterwards.[9] In Partington's case, the Hawaii Supreme Court is not only the biased forum, but also the first and last judicial body from which Partington may seek relief. Thus, the state court remedies in *Gibson* were, if anything, far *more* hospitable to the plaintiff than those offered to Partington here. As *Younger* abstention was improper in *Gibson*, it is *a fortiori* improper here, if as I conclude, the Hawaii Supreme Court is biased on the ineffective assistance claim.[10]

The majority's confusion regarding abstention and bias appears to be due to its misunderstanding of the third prong of the *Middlesex* test. The majority consistently describes that prong as requiring that Partington have the ability to litigate his constitutional claims before an unbiased state adjudicator. Majority op. at 120-121, 125-126. Actually, the third prong of *Middlesex* does not mention bias – because under *Younger* that issue is dealt with separately. The third prong requires only that Partington have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. The critical fact that the majority overlooks is that in *Younger*, the Supreme Court recognized that even if the three-part test for abstention (as

[9] I seriously doubt that, as a legal matter, a lower court, in Hawaii or elsewhere, has the authority to enjoin a proceeding before a higher court.

[10] In some instances, a *claim* of bias would be sufficient to preclude abstention, at least until the federal court has had an opportunity to resolve the factual issues relating to the claim. Here, however, there are no factual issues in dispute with respect to the alleged bias.

later described in *Middlesex*) was met, abstention would be improper if the state action was brought in bad faith or for purpose of harassment or in other *extraordinary circumstances*. 401 U.S. at 53-54, 91 S.Ct. at 754-55; *see also Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Bias on the part of the state tribunal is one of those extraordinary circumstances which renders *Younger* abstention inappropriate, even if all three prongs of the *Middlesex* test are met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1531 & n. 4; *cf. World Famous Drinking Emporium*, 820 F.2d at 1082. Thus, it is simply irrelevant whether Partington will be able to raise his constitutional claims before the Hawaii Supreme Court or whether the Court is biased as to those claims; for if the Court has prejudged the merits of the disciplinary proceeding, it is a biased tribunal and *Younger* abstention is inapplicable.[11]

The majority dismisses the Court's statement in *Kugler* that bias is a separate element by calling it dictum. Majority op. at 22 n. 3. Whatever the merits of that categorization, it seems apparent that the Court was correct when it reached its conclusion. *Younger* abstention is barred when, *inter alia*, "extraordinary circumstances" render the proceedings unfair, a concern that is

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[11] It is worth noting that a letter dated April 27, 1987 to Partington from the Chief Justice, a letter the majority appears to accept as the view of the entire court, Majority op. at 126, suggests that the court has in fact prejudged the due process claim. *See* ER 444 (Chief Justice finds "mystifying" Partington's contention that he could not receive an impartial hearing on the ineffectiveness claim). Surprisingly, at a later point in the majority opinion, the letter is summarily dismissed as at most reflecting the opinion of the Chief Justice. Majority op. at 128 n. 7.

independent of whether the federal court plaintiff will have an adequate opportunity in the state proceedings to raise his federal constitutional claims. *Middlesex* listed as examples of this rule a proceeding brought in bad faith or for purposes of harassment. 457 U.S. at 435, 102 S.Ct. at 2522. Certainly a proceeding brought before a biased tribunal is even more unfair to a licensee, and even more violative of his due process rights, than a proceeding that is merely initiated for an improper purpose. In the case of bad faith or harassment, the licensee is required to submit to a proceeding unnecessarily, but should prevail on the merits; in the case of bias, the licensee does not have a fair chance to prevail at all, and an adverse result is, for practical purposes, a foregone conclusion. Thus, the Court's determination in *Kugler* that bias is an "extraordinary circumstance" barring *Younger* abstention was compelled by reason and logic as well as precedent, and the majority clearly errs in rejecting the Court's analysis.

In any event, whether bias is considered separately from the three-prong *Middlesex* test, or whether we disregard the clear language in *Kugler* and consider bias to be a part of the third prong of that test, the result in this case would be the same. As previously discussed, under *Gibson* it is clear that bias on the merits of a disciplinary proceeding is sufficient to preclude *Younger* abstention.

The majority next concludes that the Rule 13 procedure does not present an unacceptable risk of prejudgment on the ineffectiveness issue, although it is far from clear why it reaches that conclusion.[12] Majority op. at 125.

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[12] At one point, the majority argues that Partington has not alleged that the Hawaii Supreme Court is biased "on the

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The majority appears to accept the *Withrow* test, which states that "if the initial view of the facts based on the evidence derived from non-adversarial processes as a *practical or legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question [is] raised." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470 (emphasis added). With respect to the issue of "legal" bias, the majority concludes that Partington has not demonstrated that the Hawaii Supreme Court is legally foreclosed "from considering the ineffectiveness issue de novo." Majority op. at 126. On that point, I am in agreement.[13] However, the majority also concludes that there is

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primary issue . . . [namely] whether corrective action is warranted [against Partington] under Rule 13." Majority op. at 126. Any distinction between whether the court is biased "merely" on the ineffective assistance issue rather than on the corrective action issue is semantic gameplaying at best. I find it hard to believe that anyone would suggest that a court that has prejudged the issue whether Partington rendered ineffective assistance is unbiased on the question whether he should be the subject of disciplinary action. The Hawaii Supreme Court is *necessarily* required to judge the issue on which it is biased *before* determining the appropriate remedy. Obviously, if the court were to decide the issue relating to conduct in Partington's favor, there would be no need for it to reach the question whether corrective action is warranted.

[13] Partington has not demonstrated by unambiguous authority that the court is legally precluded from reconsidering its initial determination of ineffectiveness. For the purposes of our *Younger* analysis, we must assume that the Hawaii

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no "practical" impediment to the Court's examining the issue in a fair and impartial manner. *Id.* at 125, 126. The majority offers *no* explanation for this conclusion, and cites no case law or other authority. In fact, the majority opinion contains no discussion whatsoever of the question whether the Hawaii Supreme Court could, as a practical matter, serve as an unbiased adjudicator. Instead, it avoids the issue entirely, apparently preferring to base its conclusion that Partington will be able to obtain a fair hearing entirely on the supposition that all of the members of the supreme court will recuse themselves.[14] *Id.* at 126.

I believe that, as a practical matter, the Hawaii Supreme Court has prejudged Partington's case. At the very least, there is an intolerable risk of prejudgment. The sole reason Partington is now facing disciplinary proceedings is because in a previous proceeding the Hawaii Supreme Court, *sua sponte*, raised *and decided*, on the merits, the issue of ineffective assistance of counsel in a manner adverse to him. The issue the court previously decided is the identical issue it will now be required to address in the Rule 13 proceedings. In my view, the Hawaii Supreme Court is not, as a practical matter, an unbiased adjudicator.

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Supreme Court is free to reexamine its previous legal conclusion on the question of ineffective assistance. If, however, this assumption turns out to be incorrect, I do not think anyone could argue that the Rule 13 proceeding would satisfy due process.

[14] The question of recusal is discussed *infra*, section III.

There are several federal statutes which are concerned with the issue of judicial bias. *See* 28 U.S.C. §§ 47, 144, & 455 (1982). These statutes are premised on the simple proposition that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). But a fair trial means more than simply the absence of actual bias. "[O]ur system of law has always endeavored to *prevent even the probability of unfairness.*" *Id.* (emphasis added). To this end, "justice must satisfy the appearance of justice." *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). Thus, we must constantly be alert to procedures which "under a realistic appraisal of psychological tendencies and human weakness . . . pose[] such a risk of actual bias or prejudgment that the practice[s] must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.

While we can readily identify the reasons why judicial bias cannot be tolerated, we must still determine when a judge's previous involvement with a case creates such a risk of bias that it would be a violation of due process to allow him to be further associated with the proceedings. Two decisions help frame the issue. Prejudgment, or an unconstitutional risk of prejudgment, has been found where the contents of a speech by a judge "plainly reveale[d]" that he had, prior to the commencement of the proceedings before him, reached a conclusion as to the merits of a case that involved complex questions of fact and law. *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754, 760 (D.C.Cir.1964), *vacated on other grounds*,

381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed.2d 714 (1965).[15] Also, judges have been disqualified from presiding over appeals from decisions in cases, or involving issues, originally tried before them as lower court judges. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 135, 137 (5th Cir.1970) (Order of Disqualification and Memorandum of Decision by Craven, J.) (appeals court must "be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance") (quoting *Moran v. Dillingham*, 174 U.S. 153, 19 S.Ct. 620, 43 L.Ed. 930 (1899)).[16]

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[15] Our present Chief Justice has said that the mere fact that a judge has expressed an opinion on a purely legal question would not demonstrate bias or prejudgment, *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (memorandum on recusal by Rehnquist, J.). We have reached the same conclusion. *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). The situations discussed by Justice Rehnquist and by this court in *Conforte* were far different from the one present in *Texaco*. *Conforte* is discussed further *infra*, note 20.

[16] In *Swann*, Judge Craven applied 28 U.S.C. § 47, which explicitly forbids the practice of a judge hearing an appeal from a case which he tried. The same result has been reached through application of 28 U.S.C. § 455, which requires a judge to recuse himself to avoid the appearance of impropriety. *Rice v. McKenzie*, 581 F.2d 1114, 1116-18 (4th Cir.1978) (federal judge, who, as chief justice of state supreme court, had presided in affirming appeal of convicted person was disqualified from federal habeas corpus proceedings because of concerns with impartiality). *Cf. Withrow*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25 ("when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review").

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While *Texaco* and *Swann* provide some guidance, there are significant differences between those cases and Partington's. The commissioner's prejudgment in *Texaco* was extrajudicial; the remarks were made during a public appearance and were not based on knowledge the commissioner obtained during an official proceeding. *Cf. United States v. Studley*, 783 F.2d 934 (9th Cir.1986). *Swann* was concerned with the issue of what constitutes a meaningful review by a higher court of a lower court's decision. In the present case, the issue is: when is a court that is called upon to decide a complex question of law and fact as to which it has already reached a final determination in an earlier proceeding presumed to have prejudged the question?

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In light of current practice, the comments in the concurring opinion on the history of the practice of the Supreme Court acting "as a court of appeals from decisions of circuit courts made by the Justices as circuit judges," Concurring op. at 132, and specifically its discussion of *Stuart v. Laird*, 1 Cranch 298 (1803), and *The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825), while interesting, shed no light on the specific issue before us. Just as our view of the slave trade has changed from that espoused in *The Antelope*, so too has our view of the propriety of judges sitting in judgment on their own decisions. Moreover, in *The Antelope*, no challenge was made to the individual Justice's participation in an appeal from a case in which he had sat as a circuit judge; perhaps more interestingly, in *Stuart*, "[t]he Chief Justice, having tried the cause in the court below, declined to give an opinion." *Id.* at 306. Most importantly, in neither case did the Justices even consider the question we are presented with, that is, whether a court comprised wholly of judges who decided the same case at a lower judicial level may hear an appeal of that lower court decision, and certainly the concurring opinion does not suggest that any such practice ever existed.

Although *Texaco* and *Swann* are not dispositive, the policies which underlie them compel the conclusion that the Hawaii Supreme Court is biased in this case. The common thread that links *Texaco* and *Swann* is the concept that no person can be compelled to litigate a controversy before a judge whose prior conduct or connection with the case makes it likely that he will have prejudged the outcome. The reason that due process does not permit a judge to hear an appeal of a case he previously tried as a lower court judge has been well stated. "Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published opinion." *Swann*, 431 F.2d at 137 (quoting an address by Walter B. Hill to the American Bar Association). The concerns reflected in *Swann* relate not only to the risk that a judge will have actually prejudged a case, but to the appearance of partiality as well. As the Supreme Court made abundantly clear in *In re Murchison*, "justice must satisfy the appearance of justice." 349 U.S. at 136, 75 S.Ct. at 625.

Here, the court which will decide in the disciplinary proceeding whether Partington provided ineffective assistance of counsel is the same body that has already determined in *State v. Clarke* that Partington did precisely that.[17] It has also issued an opinion to that effect and has

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[17] The concurring opinion suggests at one point that prejudgment "must be based upon something other than rulings in the case." Concurring op. at 133, *quoting Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921); *see also Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981) (judge's participation in prior or related proceeding not sufficient to

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reversed a murder conviction on that ground. These circumstances present an unacceptable risk of prejudgment, one that neither Partington nor any other litigant should be required to assume. They also fall far short of satisfying "the appearance of justice".

The conclusion that the Hawaii Supreme Court does not qualify as an impartial body insofar as Partington's Rule 13 proceeding is concerned finds strong support in *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Withrow*, the Court considered whether the combination of investigative and adjudicative functions in a state administrative agency violated due process. It suggested that bias or prejudgment would be established if an initial accusatory finding foreclosed, as a practical matter, a later adjudicatory finding to the contrary.[18] *Id.* at 58, 95 S.Ct. at 1470. The Court concluded that the state practice did not violate due process, because the initial investigative decision was one of probable cause, a determination that would not be logically inconsistent with a subsequent adjudicatory determination of "no violation". *Id.* at 57, 95 S.Ct. at 1469. Or, as the Court put it, a favorable second decision would not constitute an implicit admission that the first was erroneous.

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constitute bias). However, none of the cases the concurring opinion relies upon (with one exception) involves a situation in which, as here, the judges will be called upon to determine the same complex question of fact and law on which they previously reached a final determination. The one exception, *Denis v. Perfect Parts, Inc.* 142 F.Supp. 263 (D.Mass.1956), is discussed in note 20, *infra*.

[18] The majority apparently does not disagree with this suggestion. *See* Majority op. at 124, 126.

Here, the Hawaii Supreme Court has not merely made a preliminary or accusatory finding that Partington *may have* rendered ineffective assistance of counsel. Rather, it has made a finding *on the merits* that the assistance Partington rendered was so ineffective as to require the reversal of a murder conviction. Certainly, a subsequent finding by that same court in a Rule 13 proceeding that Partington had not rendered ineffective assistance of counsel would be logically inconsistent with its prior finding.[19] The Court would "implicitly be admitting error in its prior finding."[20] *Id.* 421 U.S. at 57, 95 S.Ct. at 1469.

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[19] None of this discussion is meant to minimize the problem of ineffective assistance of counsel for criminal defendants, nor to suggest that the Hawaii Supreme Court cannot fulfill its duty to supervise attorney conduct. Nevertheless, the Court cannot exercise its authority in a manner which violates the requirements of due process. A Rule 13 procedure can undoubtedly be devised which meets those requirements. *See infra* pages 146-147.

[20] The concurring opinion concludes that there would be "no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer." Concurring op. at 134 (emphasis in original). The logic of this statement escapes me. If the court determines that Partington's strategy was reasonable and that it justified his trial tactics, I do not see how it could also say that there was a sixth amendment violation. If the strategy justified the tactics, then the assistance was *not* ineffective.

The concurring opinion also concludes, without analysis, that the fact that the Hawaii Supreme Court has already reversed a murder conviction because the defendant received

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The concept of "logical inconsistency", emphasized in *Withrow*, helps distinguish this case from cases holding

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ineffective assistance from Partington does "not constitute disqualifying bias [on the part of the members of the court] because it is not the kind of aversion or hostility that a fair-minded person would be unable to set aside." Concurring op. at 132. However, the case that it relies on, *United States v. Conforte*, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), involved a type of prejudgment wholly unlike the prejudgment present in this case. In *Conforte*, the alleged bias was *personal* – the trial judge had allegedly made derogatory statements about the defendant some years prior to the time when the defendant appeared before the judge. 624 F.2d at 878-79. We held that the bias alleged was not sufficient to require recusal, and that disqualification for *personal* bias required "an animus more active and deep-rooted than an attitude of [non-racial] disapproval toward certain persons because of their known conduct." *Id.* at 881 However, the question of the depth of personal animosity required to constitute disqualifying bias bears no relationship to the question whether a court has actually prejudged the merits of the case before it because it has rendered a final decision in a previous case on the same issue it is now called upon to decide.

The only case that the concurring opinion relies on that is at all factually similar to our case is *Denis v. Perfect Parts, Inc.*, 142 F.Supp. 263 (D.Mass.1956). In that case, the district judge declined to recuse himself at the request of the defendant, although he would be called upon to determine the validity of a patent which he had declared valid in a previous case that involved the same plaintiff but a different defendant. *Id.* at 263. The Judge declined to disqualify himself, because he concluded that 28 U.S.C. § 144, the disqualification statute, "is directed to personal bias, not to previous exposure to the same or similar questions." *Id.* The judge believed that a contrary

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that a judge who initiated the proceedings may preside at the hearing on the merits.[21] For example, a judge who charges an attorney with violating Rule 11 and orders him to show cause is permitted to conduct the subsequent hearing. *See, e.g., Tom Growney Equipment, Inc. v. Shelley Irrigation Dev. Inc.*, 834 F.2d 833 (9th Cir.1987). A determination by the judge at the later hearing that Rule 11 sanctions are not appropriate would not be inconsistent with his issuance of the initial charge. The initial charge or finding is similar to one of probable cause, while the later determination on the merits is akin to one of guilt or innocence. Similarly, when a court cites an attorney for contempt, orders him to show cause, and then presides over the contempt trial, *e.g., Nilva v. United*

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result would minimize or eliminate the value of judicial experience and exposure. *Id. Denis* would thus suggest a different result than the one that I reach here. However, as the concurring opinion points out, "[s]ensibilites no doubt are changing on the question of judicial bias." Concurring op. at 133. Indeed, the author of the opinion in *Denis* has expressed considerable doubt about the decision he reached in that case. *See Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.1977). Thus, *Denis*, while never controlling on this court, cannot any longer even be considered persuasive.

[21] Although Judge Noonan does not disagree with the use of the "logical inconsistency" standard, he would seem to rely on each individual justice's view as to whether he has prejudged Partington's case. *See* Concurring op. at 134. This conclusion appears to be at odds with the prevailing notion that an objective standard is to be used. *See, e.g., Berger v. United States*, 255 U.S. 22, 33-34, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921); *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.) *cert. denied* 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980); 28 U.S.C. § 455 (1982); *see also* Concurring op. at 134.

States, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415 (1957), a finding of not guilty is not logically inconsistent with the fact that a charge was preferred. Another example is the issuance of a preliminary injunction by a judge who subsequently presides over a trial in which he determines whether a permanent injunction should issue. This practice is proper because the question at the hearing on the preliminary injunction is solely one of "reasonable cause"; no determination on the merits is made at that time. Thus, there is ordinarily neither the appearance nor the reality of logical inconsistency or prejudgment in any of the above cases when the merits are heard.[22]

At first glance, a more troublesome analogue is presented when a trial judge presides over a trial for the second time after his initial decision has been reversed on appeal. This practice does not generally create a risk of bias or prejudgment implicating due process concerns.[23]

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[22] It is worth noting that the judge who initiates the contempt proceedings is not always permitted to preside over them. For example, if "the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent." Fed.R.Crim.P. 42(a). *See also In re Murchison*, 349 U.S. 133, 137, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (trial for contempt during grand jury proceedings before same judge who acted as one-man grand jury violates due process because "[h]aving been a part of that process a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused").

[23] Of course, an appellate court may, under its supervisory powers, reassign the case on remand to a different trial judge, if it determines under the circumstances of the case that allowing the same judge to rehear the case poses an unacceptable

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See, e.g., NLRB v. Donnelly Garment Co., 330 U.S. 219, 236, 67 S.Ct. 756, 765, 91 L.Ed. 854 (1947); *United States v. Hollis*, 718 F.2d 277 (8th Cir.1983), *cert. denied*, 465 U.S. 1036, 104 S.Ct. 1309, 79 L.Ed.2d 707 (1984). However, our judicial system has built-in mechanisms that serve to protect litigants against the risk of prejudgment in such cases, and help to maintain the appearance of impartiality. When a trial judge presides over a trial after remand, intervening appellate guidance significantly minimizes the risk of bias. The trial judge is advised that his initial decision was incorrect, and receives specific guidance from the reviewing court as to the aspects of the trial which created reversible error. Usually, the trial judge is also given specific instructions as to what remedial or corrective actions should be taken in the second trial. In addition, the decision in the second trial will itself be subject to judicial review. That review also serves as an independent restraint on the trial judge, because he will be aware that evidence of bias or prejudgment on his part will lead to a second reversal.[24]

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risk of bias. *See, e.g., Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir.1987).

[24] The practical reality of retrying numerous cases after appeal virtually requires that, with appropriate safeguards, our judicial system allow the same judge who presided over the first trial to preside again after appeal. *United States v. Harris*, 458 F.2d 670, 678 (5th Cir.) (" 'used' judges must simply be recycled" to avoid problem of no judge in a particular venue being able to hear a litigant's case), *cert. denied*, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). Neither the courts generally nor Hawaii courts in particular face a comparable practical problem with respect to the adjudication of disciplinary cases.

None of the procedures which serve to eliminate or reduce the risk of prejudgment when a trial judge rehears a case following reversal or remand are applicable in Rule 13 proceedings. Under Rule 13, there is no superior authority that will have informed the supreme court that its initial decision was incorrect prior to the time it hears the issue for the second time; no higher court will have explained to the Hawaii Supreme Court the nature of its errors in the initial proceedings or provided it with guidance as to those errors. Nor will the supreme court have had the benefit of specific instructions as to how to conduct the second proceeding. While remand to a trial court occurs because that court's initial decision has been found to be incorrect and has been reversed, no comparable events will have occurred here. To the contrary, the disciplinary proceedings will take place here because the Hawaii Supreme Court's determination of ineffective assistance has *not* been vacated or set aside by a higher court. Equally important, the supreme court's determination in the Rule 13 proceedings will be final, with no right of appeal to a superior judicial body.[25]

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[25] The concurring opinion suggests that our current en banc practice also presents a troublesome analog. Concurring op. at 131-133. However, that circumstance is wholly different from the one with which we are now confronted. When a circuit court sits en banc, the court *rehears* the case at issue, just as the original panel may. The en banc judges do not, as the Hawaii Supreme Court under Rule 13 is required to do, decide a complex issue of fact and law on which the court has already reached a *final* determination in a *prior* case. The practice of granting a rehearing in a pending case poses none of the problems presented by a court requiring a party to submit to it for decision an issue on which the court has already rendered a final decision adverse to that party.

For the reasons discussed above, I cannot agree that Partington must show more than the fact that the Hawaii Supreme Court is biased on the merits of the disciplinary proceeding. Nor can I agree that Partington has failed to establish the existence of that bias. In my opinion, the court's prior determination in *State v. Clarke* that Partington provided ineffective assistance would "give[ ] fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *United States v. Haldeman*, 559 F.2d 31, 136 (D.C.Cir.1976) *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The Supreme Court has warned us to "be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Withrow*, 421 U.S. at 54, 95 S.Ct. at 1468. The majority fails to consider sufficiently the nature of the triggering determination in Rule 13 proceedings, and thus gives short shrift to the very real problem of prejudgment the rule presents. The Supreme Court has held that, if a state administrative agency is biased, *Younger* abstention is inappropriate even if state "judicial review, *de novo* or otherwise, would be forthcoming at the close of the administrative proceedings." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). The same conclusion holds true *a fortiori* where, as here, the biased decision of a court will not be subject to *any* review.[26]

[26] The majority opinion contends that Hawaii's Rule 13 disciplinary procedure is "strikingly similar" to the New Jersey disciplinary proceeding which the Supreme Court held, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), provided a

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III

RECUSAL

In concluding that Partington will be able to bring his claims before an impartial tribunal, the majority does not determine whether the justices of the Hawaii Supreme Court have, as a *practical* matter, prejudged his claim; nor does it consider whether disciplinary proceedings before those justices would give the requisite appearance of impartiality. *See* Majority op. at 120. Rather, its conclusion is based entirely on Partington's supposed ability to obtain the recusal under Haw.Rev.Stat. § 601-7(b) (1985) of all five of the justices of the court.[27] Majority op. at

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charged attorney with an adequate opportunity to raise his constitutional claims. Majority op. at 121. However, any "similarity" between the two systems is at most superficial, and in any event irrelevant to the question of prejudgment.

Under the New Jersey attorney disciplinary system, a local Ethics Committee is authorized to receive complaints about attorney misconduct. It then makes an initial determination whether an attorney should be disciplined for unethical conduct. 102 S.Ct. at 2518. If the Committee determines that disciplinary action is warranted, it prepares a presentment for the Disciplinary Review Board. *Id.* at 2518-19. The Review Board then decides what disciplinary action, if any, is warranted. The New Jersey Supreme Court's *first* involvement with the proceedings is when it reviews the Review Board's decision. *Id.* at 2519.

[27] Although the majority refers to Partington's ability to seek recusal of *"certain* members of the Supreme Court [who] may be personally biased against him . . . by virtue of their finding of ineffectiveness of counsel in *State v. Clarke,"* Majority op. at 127 (emphasis added), the opinion in *Clarke* shows that *all* of the justices found that Partington's assistance was ineffective. ER 158-59.

126-128. In short, the majority appears to assume that some group of judges other than the sitting supreme court justices will hear Partington's case. Once again the majority does not discuss the legal issue involved, that is, whether Hawaii's recusal statute is applicable here; this time it simply asserts, *ex cathedra*, that it is.

Hawaii law provides for recusal of the entire court "[w]hen necessary." Haw.Rev.Stat. § 602-10. On its face, this language would seem to support the majority's position. But recusal statutes are generally addressed to claims of bias in individual cases, that is, the problem of alleged bias on the part of some or all of the justices arising from the peculiar facts of an individual case or group of related cases. *Cf.* C. Wolfram, *Modern Legal Ethics* 982-99 (1986) (discussion of disqualification of judges for interest or bias contains no mention of types of bias other than individual). Rule 13 presents a very different problem than is usually addressed under recusal statutes. Under Rule 13, prejudgment is not the exceptional case, arising only under unusual circumstances. Rather, the conflict the Hawaii Supreme Court justices are confronted with in Partington's case is the *inevitable* result of the way the rule is structured. That structure ensures that prejudgment will be endemic in disciplinary cases. Far from being a random occurrence during a particular Rule 13 proceeding, prejudgment is the institutional norm.

Under Rule 13, the Hawaii Supreme Court makes the final determination in all disciplinary proceedings as to whether an attorney provided ineffective assistance of counsel. The event that triggers the Rule 13 proceedings is a determination, made in a criminal proceeding, by the supreme court or the intermediate appellate court or both

that the attorney did in fact provide ineffective assistance.[28] The supreme court may have been the first court to make that determination in the criminal proceeding or it may have affirmed the finding of the intermediate court.[29] Wherever or however the determination of ineffectiveness was made in the criminal proceeding, Rule 13 vests the Hawaii Supreme Court with the authority to make the subsequent ineffectiveness determination in the disciplinary proceedings.

As already noted, the majority contends that recusal of all of the Hawaii Supreme Court justices will solve whatever bias or prejudgment problem Partington may face. However, the majority's "solution" would not apply to Partington's case only. It would require the recusal of every member of the supreme court in every case which was initiated because the supreme court had made or affirmed the triggering ineffectiveness finding. *All* such cases would be heard by judges who are not sitting members of the Hawaii Supreme Court. Such a procedure

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[28] Disciplinary proceedings are instituted whenever such a determination is made and the criminal conviction is reversed. Haw.S.Ct.R. 13. Conceivably, in rare instances the reversal of a conviction on the ground of ineffective assistance of counsel could originate in the trial court. However, in such cases, there is still a reasonable possibility that the determination will subsequently be affirmed (or reversed) by the intermediate appellate court, the supreme court, or both. Accordingly, there is no need to consider these cases separately, and they are subsumed within the discussion contained in the text.

[29] Of course, where the intermediate appellate court makes the determination in the criminal proceeding and the decision is not reviewed by the supreme court, no due process issue is presented by the provisions of Rule 13.

would be directly contrary to the disciplinary system the Hawaii Supreme Court actually enacted, a disciplinary system which contemplates a final determination by the supreme court in *all* cases. The majority's assertion that the recusal statute is applicable here is simply incompatible with the language and intent of Rule 13.

A Rule 13 system could easily have been devised under which the supreme court would make the determination of ineffective assistance of counsel in a disciplinary proceeding if the original finding of ineffectiveness had been made in an unappealed decision of the intermediate appellate court, and the intermediate appellate court would make the disciplinary determination if the supreme court had originated the earlier ineffective assistance finding.[30] But the Hawaii Supreme Court chose not to enact such a system. Instead, it chose to make itself the final judge of whether an attorney had provided ineffective assistance in all cases – those in which it had made or affirmed the earlier determination that the attorney was in fact ineffective as well as those in which only the intermediate appellate court had made such a determination. Rule 13 explicitly provides that the disciplinary proceeding be adjudicated by the supreme court, not by appellate court judges or retired supreme

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[30] If the intermediate appellate court had made the initial ineffectiveness finding and the Hawaii Supreme Court had affirmed, neither the supreme court justices nor the appellate court judges who participated in the criminal proceedings could be involved in the disciplinary case. However, other active appellate court judges as well as retired supreme court justices, retired appellate court judges, or active or retired circuit court judges would be eligible, if authorized by a revised Rule 13.

court justices. If, when it adopted rule 13, the Hawaii Supreme Court had intended that intermediate court judges or retired supreme court justices adjudicate the disciplinary proceedings which had been initiated because of a finding made by the supreme court, it would certainly have included a provision to that effect in the text of the rule.[31]

It is clear that the Hawaii Supreme Court did not intend the recusal statute to be applicable in cases such as Partington's because application of the statute to such cases would do precisely what the court refused to do when it enacted Rule 13. It would require that disciplinary proceedings arising out of reversals ordered by the supreme court, or out of cases in which the supreme court upheld a reversal ordered by a lower court, be adjudicated by a group of judges who are not active members of the court. The majority errs in attempting to save Rule 13 by presuming the applicability of Hawaii's recusal statute.[32] The proper course would be to

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[31] For the same reason, it would not be reasonable to suggest that the court had the recusal statute in mind when it drafted Rule 13, and that it therefore expected retired justices or active circuit judges, *see* Haw.Rev.Stat. § 602-10, to hear those disciplinary cases which result from criminal proceedings which have previously reached the supreme court level. That class of cases constitutes far too significant a part of the potential pool to have been overlooked by the court or excluded *sub silentio* from the regular procedure.

[32] The Supreme Court has held that the ability to seek recusal is sufficient to protect due process requirements. *Kugler v. Helfant*, 421 U.S. 117, 130-31, 95 S.Ct. 1524, 1533-34, 44 L.Ed.2d 15 (1975). In *Kugler*, the Supreme Court affirmed the

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invalidate the rule and permit the Hawaii Supreme Court to reenact a version that does not offend due process.

IV

CONCLUSION

Certainly, judges are entitled to a presumption of absence of bias, *see Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982), as well as one of integrity and honesty. *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. They are also entitled to a presumption that they will follow their duty to "be unswayed by partisan interests, public clamor, or fear of criticism." Haw.S.Ct.R. 8.5(a)(5), *incorporating* Code of Judicial Conduct, Canon 3(A)(1). But such a presumption "does not, of course, preclude a court from determining from the special facts

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district court's dismissal of a complaint on the basis of *Younger*, emphasizing that recusal would solve any due process problem that might arise from the possibility of bias on the part of individual members of the New Jersey Supreme Court. *Id.* *Kugler* involved an individual instance of bias, not the systemic bias present here. Because Rule 13 contemplates that the Hawaii justices will determine the question of ineffective assistance of counsel under that rule and not that they will all be recused from hearing such cases when the triggering determination has been made by the Hawaii Supreme Court, recusal is not an available option here. Thus, *Kugler* is inapplicable. In addition, this court has held that a plaintiff's failure to utilize state disqualification procedures will prevent us from making a determination whether his case fits the bias exception to *Younger*. *Flangas v. State Bar of Nevada*, 655 F.2d 946, 950 (9th Cir.1981). However, *Flangas*, like *Kugler*, involved an individual instance of bias to which the state recusal statute was clearly applicable.

and circumstances present in the case before it that the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470. This is just such a case. Under Rule 13, the Hawaii Supreme Court would be called upon to determine whether Partington rendered ineffective assistance of counsel, despite the fact that it has previously determined, in reversing a murder conviction, that he did precisely that. While I have no doubt that the justices of the Hawaii Supreme Court would attempt to comply with their duty to be impartial, the risk of prejudgment on the part of the court is too great. So, too, is the price the courts would pay for failing to preserve the appearance of justice.

The majority's suggestion that Partington must now present his arguments to a tribunal that has prejudged the merits of the disciplinary proceedings because he has not shown that the tribunal is biased on the issue of whether it is biased, misconceives the law of abstention. Partington has shown all that he need show in order to obtain a federal court injunction – he has shown that the state tribunal has prejudged the merits of the disciplinary proceedings. *See Gibson*, 411 U.S. at 577-78, 93 S.Ct. at 1697. I see no legal or practical reason for forcing Partington to first present his claims to the Hawaii Supreme Court.

Although the majority posits recusal of all of the justices as a possible solution to the prejudgment problem, it offers no support for the assumption that Hawaii's general recusal statute is applicable. In fact, the structure of Rule 13 compels the conclusion that this remedy is simply not available here. Rule 13 explicitly requires that the Hawaii Supreme Court adjudicate all cases arising

under the rule, not that the determination be made by an entirely different group of judges whenever the initial determination was made or affirmed by the supreme court.

For these reasons, the Hawaii Supreme Court simply cannot be said to provide Partington with an unbiased forum insofar as the disciplinary proceedings are concerned. Accordingly, *Younger* abstention is inappropriate.[33] I would reverse the district court's decision and remand the case to that court with instructions to enjoin the Rule 13 proceedings.

SANCTIONS

While I agree with the majority that sanctions against Chang and Gedan are appropriate, I cannot agree that Rule 11 is a proper basis for imposing them. Certainly, Rule 11 was not the basis the Seventh Circuit relied upon in *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421, 1422 (7th Cir.1988), a case the majority cites as precedent for its sanctioning of Chang and Gedan. The Seventh Circuit has made it abundantly clear that Rule 11 does not apply to proceedings before courts of appeals. *See, e.g., Leigh v. Engle*, 858 F.2d 361, 370 n. 5 (7th Cir.1988), *cert. denied*,

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[33] Because the Hawaii Supreme Court is biased for the reasons explained above, it is not necessary to decide whether it is also biased as to Partington's equal protection claim. Nevertheless, the April 27, 1987 letter to Partington from the Chief Justice strongly suggests that the Court has prejudged that issue as well. *See* note 11 *supra* and ER 446 (stating reasons that Rule 13 need not be applied to prosecuting attorneys as well as to defense attorneys).

___ U.S. ___, 109 S.Ct. 1528, 103 L.Ed.2d 833 (1989); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 306 n. 6 (7th Cir.1988); *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir.1988).

The majority attempts to avoid this problem by stating that, unlike the Seventh Circuit, this circuit has adopted Rule 11 for proceedings before this court. However, the cases cited by the majority, *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302, 304-05 (9th Cir.1987); and *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), when properly analyzed, do not stand for this broad proposition. Rather, in each of these cases, the objectionable conduct for which the attorney was sanctioned occurred in the district court.[34] Here, in contrast, the sanctionable conduct took place exclusively in the court of appeals: Chang and Gedan filed a frivolous motion for sanctions against Partington for bringing this appeal. I do not believe that we can properly adopt Rule 11 for appellate proceedings through the exercise of our decision making function. Rule 11 is applicable to actions taken in the district courts not the bankruptcy courts, *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir.1987); Fed.R.Civ.P. 81(a)(1), or the courts of appeals. *Leigh; Borowski; Hays*. If a rule similar or identical to Rule 11 is to be made applicable to federal appellate courts generally, an amendment to the Federal Rules of Appellate Procedure will be required. If, on the other hand, a

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[34] While *In re Curl* is at best ambiguous, it appears that the principal conduct the attorney was sanctioned for in that case was the filing in the district court of a frivolous notice of appeal.

judge of this court believes that our court should adopt such a rule for ourselves, he should request our Advisory Committee on Rules to act. However, even if we could extend Rule 11 to appellate proceedings, it would be unwise to do so. The satellite litigation we would be inviting is not worth the candle.

Of course, this still leaves the question of what the proper basis for our imposition of sanctions against Chang and Gedan should be. While *Meeks* did not make clear what basis the Seventh Circuit relied upon to grant sanctions, there are several options available to us: Fed.R.App.P. 46(c); 28 U.S.C. § 1927; or our inherent powers. Unwarranted sanctions motions serve to multiply proceedings unnecessarily and to harass one's opponent. Because I believe that Chang and Gedan's filing of a motion for sanctions against Partington for bringing this appeal was unreasonable and vexatious, I would impose sanctions pursuant to 28 U.S.C. § 1927.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 87-2375
	)
EARLE A. PARTINGTON,	) D.C. No.
	) CV-87-0172-KAY
Plaintiff-Appellant,	)
	)
-vs-	) ORDER
	) DENYING
JOSEPH M. GEDAN;	) PETITION FOR
HOWARD T. CHANG,	) REHEARING
	)
Defendants-Appellees.	)
	) FILED DEC 22 1989
	)

Appeal from the United States
District Court for the
District of Hawaii

Before: WALLACE, REINHARDT, and NOONAN,
Circuit Judges.

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EARL A. PARTINGTON, Plaintiff, vs. JOSEPH M. GEDAN, et al., Defendants.	)	CIVIL NO. 87-0172

ORDER GRANTING INTERVENOR'S MOTION TO FILE AMICUS BRIEF AND DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed July 1, 1987)

Defendants' Motion to Dismiss, Plaintiff's Motion for Summary Judgment, and Intervenor Hawaii Association of Criminal Defense Lawyers' Motion to File Amicus Brief came on for hearing on June 8, 1987. The court, having read the motions, the memoranda in support thereof and in opposition thereto, having heard the arguments of counsel, and being fully apprised therein, finds as follows:

Mr. Partington represented defendant Clark in a criminal trial in state court. Clark was convicted, and the conviction was appealed. The Supreme Court reversed the conviction because of ineffective assistance of counsel. Pursuant to Haw. S. Ct. R. 13, the Supreme Court appointed Joseph Gedan as special master to determine whether action against Partington for the alleged incompetency was warranted. Under the Rule, a special master

is appointed whenever a conviction is overturned for ineffective assistance of counsel. The special master may recommend dismissing the proceeding or imposing varying levels of corrective action. The ultimate decision rests with the Hawaii Supreme Court. Gedan appointed defendant Howard Chang to prosecute the action.

Gedan set a hearing for April 14, 1987. Before the matter could be heard, Partington filed the present action in federal court. Upon Partington's request, Gedan suspended the matter pending the outcome of this case.

Neither party objects to the request by the Hawaii Association of Criminal Defense Lawyers to file an amicus brief in this case. The validity of Haw. S. Ct. R. 13 directly affects the community of criminal defense attorneys. Therefore, the court, in its discretion, grants the Association's request.

The plaintiff has conceded that monetary damages, other than attorney's fees, cannot be collected in this action. Thus, the plaintiff is only seeking declaratory and injunctive relief, and attorney's fees pursuant to 42 U.S.C. § 1983.

On the basis of comity and federalism, this court declines to interfere with an ongoing state court case in which the plaintiff's constitutional rights will be raised. *Younger v. Harris*, 401 U.S. 37 (1971). In deciding whether to abstain, the Supreme Court has set forth a three part test: 1) whether the action constitutes an ongoing state judicial proceeding; 2) whether the proceeding implicates important state interests; and 3) whether the plaintiff is given an adequate opportunity in state court to raise the

constitutional issues. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982).

In *Middlesex County Ethics Committee*, the Ethics Committee determined that there was probable cause to believe that an attorney engaged in conduct that was "prejudicial to the administration of justice." *Id.* at 432. Accordingly, a disciplinary hearing was set. The attorney filed suit in federal court arguing that the disciplinary rules were vague and facially overbroad.

The Supreme Court held that 1) the Ethics Committee proceeding was an ongoing state judicial process. The filing of a disciplinary proceeding is judicial in nature. 2) The state of New Jersey has an extremely important interest in assuring the professional conduct of its attorneys, and 3) the New Jersey Supreme Court *sua sponte* entertained the constitutional challenge to the disciplinary rules.

The present action is an ongoing disciplinary hearing which is judicial in its nature and which implicates an important state interest in assuring the professional conduct of its attorneys. The only disputed issue is whether Partington will be accorded an adequate opportunity to raise his constitutional issues before a state tribunal.

The plaintiff asserts that the Hawaii Supreme Court has prejudged this case. *See Gibson v. Berryhill*, 411 U.S. 564 (1973) (abstention not required where the state tribunal was biased). He argues that the underlying criminal case has generated large amounts of publicity. Therefore, the state court will not admit its error in finding the plaintiff's conduct ineffective. Furthermore, the Supreme Court stated in a letter to Partington dated April 27, 1987

that Haw. S. Ct. R. 13 provided an "appropriate" procedure after the criminal appeal whereby a criminal defense attorney could contest the finding of ineffective assistance.

This court is convinced that the Hawaii Supreme Court will render a fair and impartial decision. The plaintiff's arguments fail to create even an inference of prejudice. The state court, like all courts, makes decisions in high profile cases. The mere existence of publicity does not render a court unable to reverse its own decision. The April 27, 1987 letter, contrary to Partington's representation, displays a clear intent to permit Partington to contest the finding of ineffective assistance of counsel through a de novo and independent determination by the Special Master. Therefore, the plaintiff has failed to prove a genuine issue of material fact as to the impartiality of the Hawaii Supreme Court. *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982) (the federal court may not presume that the state court is incompetent to adjudicate federal constitutional issues).

The plaintiff also argues that the combination of investigative and adjudicative functions prevent the state court from rendering a fair opinion. Therefore, he would be denied an adequate opportunity to raise the constitutional questions. However, the plaintiff's citation to *Withrow v. Larkin*, 421 U.S. 43 (1983) is unpersuasive. In *Withrow*, the Supreme Court found that the Wisconsin Examining Board of Physicians did not deny the plaintiff his due process rights when it was both the investigative and adjudicatory body. In the present case, there is no evidence to indicate any abuse of power or malfeasance

or the likelihood thereof due to the combination of functions.

Finally, the plaintiff argues that the Hawaii Supreme Court does not guarantee an oral hearing on its constitutional claims. However, the plaintiff is permitted to brief and argue the issue before the Special Master. The plaintiff is further permitted to brief the constitutional issues before the Hawaii Supreme Court. The court finds that an oral hearing before the Hawaii Supreme Court is not necessary to provide plaintiff with an adequate opportunity to raise his constitutional rights.

An oral hearing is not necessary before termination if an opportunity to submit a written response is provided. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). Fed. R. App. P. 34 enables the Circuit Courts to decide cases without oral argument if "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Similarly, an oral hearing is not a necessary or constitutional prerequisite to sufficiently inform the state court of the plaintiff's objections. Obviously, the state court may hear oral argument if it requires further information. The hearing, however, is not required where an adequate alternative is provided through written memoranda. Therefore, this court will abstain in deference to the ongoing state court proceeding.

The court further notes that in *Middlesex*, it was initially unclear whether the New Jersey Supreme Court would review the Ethics Board's decision. In the present

case, the Hawaii Supreme Court has clearly indicated that it retains jurisdiction to decide all issues in the case.

Finally, the plaintiff does not argue and this court does not believe that Haw. S. Ct. R. 13 is "flagrantly and patently" unconstitutional so as to come within the extremely narrow exception to the Younger abstention doctrine.

Accordingly, IT IS HEREBY ORDERED that Intervenor's Motion to File Amicus Brief be, and the same is, GRANTED. IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment be, and the same is, DENIED, and that Defendant's Motion to Dismiss be, and the same is, GRANTED.

DATED: Honolulu, Hawaii, JUL 1 1987.

/s/ Alan C. Kay
United States District Judge

APPENDIX D

NO. 10041

IN THE SUPREME COURT
OF THE STATE OF HAWAII

	) CRIMINAL NO. 59285
	)
	) APPEAL FROM THE
STATE OF HAWAII,	) JUDGMENT;
Plaintiff-Appellee,	) NOTICE OF ENTRY,
	) FILED JULY 2, 1984
vs.	)
	) FIRST CIRCUIT COURT
CLIFFORD M.M.	)
CLARKE, SR.,	) HONORABLE
Defendant-Appellant.	) LELAND H. SPENCER
	) Judge
	)
	) FILED 1985 DEC 27

MEMORANDUM OPINION

This is an appeal from a conviction for murder in violation of HRS § 707-701. The victim was the infant child of appellant's live-in girl friend.

Appellant raises numerous grounds on appeal, none of which we reach or decide because, in our view, the record is clear that the appellant did not have the effective assistance of counsel at trial and that therefore we must reverse and remand for a new trial.

The State's case against the appellant rested on circumstantial evidence. It is apparent from the record that a possible defense, contemplated by appellant and his counsel, was that the actual culprit was the mother. At oral argument, appellant's counsel suggested that another possible defense was that, while appellant might

have inflicted the fatal abuse, he lacked the necessary intent to cause the child's death.

We are faced with a record in which appellant's trial counsel (1) refused to make an opening statement; (2) refused to cross-examine the mother of the victim, counsel's stated reason being that certain records with respect to the witness had not been made available to him; (3) subsequently refused to call the witness himself after the records were made available to him;[1] (4) elicited testimony from two prosecution witnesses that they believed that the appellant was guilty; and (5) refused to make a closing argument.

At oral argument, appellant's counsel asserted that each of the above decisions was justifiable as a matter of tactics. We cannot agree. In our view, on this record, none of the five alleged tactical decisions which we have enumerated above (let alone all five considered together) was within the range of competency demanded of attorneys in criminal cases. *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). The effect was to substantially impair what defenses appellant had. *Antone, supra.*

We remind both counsel of their obligations under HSCR 13 once a judgment on appeal has been issued by us in this case. Reversed and remanded.

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[1] Under HRE 607, counsel could have impeached her testimony.

DATED: Honolulu, Hawaii, December 27, 1985.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank Padgett
/s/ Yoshimi Hayashi
/s/ James Wakatsuki

Earle A. Partington
(Schweigert & Associates
of counsel) for appellant

Emlyn H. Higa,
Deputy Prosecuting Attorney,
for appellee

APPENDIX E

HAWAII SUPREME COURT RULES

Rule 13 – PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.

Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master,

he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent himself. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 to DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, Defendants-Appellees.	NO. 87-2375 DC# CV-87-0172-ACK Hawaii

PLAINTIFF-APPELLANT'S OPENING BRIEF*

I. JURISDICTION AND TIMELINESS

The jurisdiction of the District Court was based upon 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3). The jurisdiction of the Court of Appeals is based upon 28 U.S.C. Sections 1291 and 1294(1). The "Order Granting Intervenor's Motion to File Amicus Brief and Defendants' Motion to Dismiss and Denying Plaintiff's Motion for Summary Judgment" was filed on July 1, 1987 (R. 19, E.R. 468). The Judgment below was filed on July 6, 1987 (R. 20, E.R. 474), and is properly appealable because it disposed of all claims of all the parties. The Notice of Appeal was timely filed on July 7, 1987, pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure (R. 21, E.R. 475).

* Covers, tables, addenda, and other material deleted in printing.

II. STANDARD OF REVIEW

The Court of Appeals reviews *de novo* a decision to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). *Goldie's Bookstore, Inc. v. Superior Court of State of California*, 739 F.2d 466, 468 (9th Cir. 1984). The Court of Appeals reviews *de novo* an order denying a motion for summary judgment. *State of Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985).

III. STATEMENT OF THE ISSUES

A. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT ABSTENTION UNDER *YOUNGER V. HARRIS* WAS MANDATED IN THIS CASE.

B. WHETHER THE DISTRICT COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

IV. STATEMENT OF THE CASE

The facts in this case are not in dispute, the case having been submitted on the pleadings and the undisputed affidavits and exhibits attached thereto (R. 1, 5, 6, 10, 14, 15, 16, and 18).[1] This statement of the case is taken

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[1] Defendants-Appellees do, however, dispute the conclusions that flow from those undisputed facts (see R. 14), but it is not a bar to a grant of summary judgment that the legal conclusions to be drawn from the undisputed facts are themselves disputed. *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 728 n.13, *reh'g denied*, 542 F.2d 1173 and *reh'g denied, Yellow Freight System, Inc. v. Truck Drivers and Helpers, Local Union No. 728*, 542 F.2d 1174 (5th Cir. 1976).

essentially from the Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss Complaint. (R. 6, E.R. 242).

This is an action brought under 42 U.S.C. Section 1983. Plaintiff-Appellant (hereinafter "Plaintiff") is a criminal defense attorney in private practice[2] who had been appointed by the Circuit Court of the First Circuit, State of Hawaii, to represent Clifford M.M. Clarke, Sr., on a charge of murdering a three-year-old child in a highly publicized and politically sensitive case – *State v. Clarke*. Clarke was convicted as charged, and Plaintiff also was his attorney in his appeal before the Supreme Court of Hawaii. No issue of effective assistance of counsel or misconduct by Plaintiff was raised by either party in either the trial or the appeal. However, the state trial judge, during the pendancy of the appeal, did complain to the Office of Disciplinary Counsel of the Supreme Court of Hawaii about Plaintiff's conduct in not making a closing argument at the trial. Plaintiff's motion, on behalf of Clarke, to the Supreme Court of Hawaii, prior to briefing, to remand the appeal to the trial court for a hearing on the trial judge's complaint was denied (R. 1, E.R. 140-157).

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[2] Plaintiff is a very experienced criminal defense attorney who also has been a prosecutor (R.6, E.R. 275-280) and who has twice been the successful attorney in actions brought under 28 U.S.C. Section 2254 to overturn decisions of the Supreme Court of Hawaii affirming criminal convictions. *Mayo v. Attorney General*, 528 F.Supp. 833 (D. Haw. 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982), *cert. denied sub nom. Higa v. Mayo*, 461 U.S. 948 (1983); and *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986).

At the oral argument of Clarke's appeal, one of the justices of the Supreme Court of Hawaii accused Plaintiff of being deliberately incompetent at Clarke's trial, which charge Plaintiff denied (see R. 6, E.R. 360-361). In its decision, the Supreme Court of Hawaii, acting *sua sponte* and ignoring the substantial issues raised by Clarke, reversed Clarke's conviction on the sole ground that Plaintiff had rendered ineffective assistance of counsel (apparently deliberate) at Clarke's trial (R. 1, E.R. 158-160).[3] Clarke, who is *not* complaining about Plaintiff's representation of him (R. 6, E.R. 422-423), has invoked the attorney/client privilege thereby barring Plaintiff from explaining his conduct at Clarke's trial (R. 6, E.R. 422-423).

The Supreme Court of Hawaii, in its decision, triggered Hawaii Supreme Court Rule (HSCR) 13, which provides for proceedings (according to a rigid time

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[3] The Supreme Court of Hawaii cited five grounds, discussed *infra*, for its decision. Those five grounds are:

1. Plaintiff refused to make an opening statement.
2. Plaintiff refused to cross-examine the mother of the victim.
3. Plaintiff refused to call the mother as Clarke's witness.
4. Plaintiff elicited testimony from two prosecution witnesses that they believed Clarke was guilty.
5. Plaintiff refused to make a closing argument.

Clarke has since been retried and reconvicted, and his second appeal before the Supreme Court of Hawaii is presently pending (R. 6, E.R. 421-422).

schedule) against defense counsel following "final adjudication of ineffective assistance of counsel in criminal cases." HSCR 13 is not limited to adjudications by the state courts, but encompasses adjudications in both state and federal courts. Under HSCR 13, the Supreme Court of Hawaii appoints a special master who in turn appoints a special prosecutor, all for the purpose of conducting proceedings to determine what "corrective action," if any, should be taken against the attorney found to have been ineffective. The burden is upon the attorney to show cause why "corrective action" should not be taken by the Supreme Court (see R. 1, E.R. 176-177).[4] Unlike HSCR 2, the general rule dealing with attorney discipline, HSCR 13 contains no provision providing for confidentiality during the proceedings. Further, HSCR 13 does not apply to prosecutors; and the Supreme Court of Hawaii has failed to apply it to one defense attorney (who is now a state trial judge) whose ineffectiveness in a state case resulted in the overturning of the conviction and the ordering of a new trial (R. 6, E.R. 279, 382-388). The Supreme Court of Hawaii has justified its failure to take action under HSCR 13 against the attorney in question claiming that there is a question as to whether the Supreme Court has the power to take any action because it was a federal court that made the finding of ineffectiveness (R. 14, E.R. 466-467).

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[4] There is no prescribed procedure in HSCR 13 proceedings. Plaintiff's effort (R. 6, E.R. 418) to determine what the procedure would be has been ignored (R. 6, E.R. 278).

Defendant-Appellee Joseph Gedan is the Special Master appointed by the Supreme Court of Hawaii pursuant to the HSCR 13 proceedings initiated against Plaintiff (R. 1, E.R. 173-175). Defendant-Appellee Howard Chang is the Special Prosecutor appointed by the Special Master pursuant to HSCR 13 (R. 1, E.R. 176-177). Despite the rigid time schedule required by HSCR 13 (which mandated a resolution of the proceedings in 1986), the Defendants took no further action toward advancing the HSCR 13 proceedings until Plaintiff brought the instant action in 1987 (R. 6, E.R. 379-381). The HSCR 13 proceedings are presently stayed pending the resolution of the instant action (R. 6, E.R. 278).

Plantiff seeks in this action (1) an injunction prohibiting Defendants from proceeding against Plaintiff pursuant to HSCR 13, (2) a declaratory judgment that HSCR 13 is unconstitutional, and (3) attorneys' fees, costs and expenses of this action.[5] The Hawaii Association of Criminal Defense Lawyers was granted leave to intervene on behalf of Plaintiff as an amicus curiae (R. 19). Defendants moved to dismiss on the ground, *inter alia*, that abstention under *Younger v. Harris*, *supra*, was mandated (R. 5, E.R. 192-193), and Plaintiff moved for summary judgment (R. 6, E.R. 232). The District Court, as noted *supra*, and relying on *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), granted Defendants' motion and denied Plaintiff's motion, and this appeal resulted.

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[5] Plaintiff had also sought damages, but that claim was abandoned. The grounds Plaintiff relied on below are the same grounds relied on in this appeal.

V. ARGUMENT

A. THE DISTRICT COURT ERRED IN HOLDING THAT ABSTENTION UNDER *YOUNGER V. HARRIS* WAS MANDATED IN THIS CASE.

B. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

These two issues are so intertwined that it is not practical to discuss one without discussing the other because they are, in effect, the two sides of the same coin. Also, as shall be seen, because *Younger* abstention depends on the ability to vindicate constitutional rights in the state proceeding, it is necessary to identify the federal constitutional rights in issue. It is also necessary to identify *when* these rights are in issue.

Defendants assumed below that HSCR 13 is triggered by a "complaint before the special master" (R. 5, E.R. 210). There is, in fact, no "complaint" in HSCR 13 proceedings (R. 6, E.R. 279). It is the "final adjudication" aspect of the decision of the Supreme Court of Hawaii that triggers proceedings under HSCR 13. These proceedings are in the nature of "penalty" phase proceedings; the "guilt" phase is concluded by the decision of the Supreme Court. This decision, however, is an integral and the initiating part of the HSCR 13 process. Thus, when looking at the constitutional rights in issue, it is necessary to look at this triggering "final adjudication" of the Supreme Court of Hawaii and not just at the actions of Defendants.

1. The Constitutional Rights in Issue

What then are the federal constitutional rights in issue? They arise out of four constitutional provisions:

a. The Free Speech Clause of the first amendment as made applicable to the states by the fourteenth amendment.

The willingness of an attorney to hold himself out in speech as a competent and vigorous attorney is seriously impaired by a finding of either incompetence or misconduct and as well as by ongoing HSCR 13 proceeding. Both the decision of the Supreme Court of Hawaii and the ongoing HSCR 13 proceedings (especially where it dragged on without action for so long as it did in this case) have a chilling effect on Plaintiff's right to free speech. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

As Defendants have pointed out (R. 10, Memo at 11), for Plaintiff to establish a free speech claim under 42 U.S.C. Section 1983, he must show that HSCR 13 is unconstitutional on its face because of its significant chilling effect on free speech which cannot be avoided by state court adjudication. *See Zwickler v. Koota*, 389 U.S. 241 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The existence of "good faith" or "bad faith" is irrelevant to this test. Here Plaintiff has shown a very significant chilling effect on his ability to hold himself out as competent counsel.[6]

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[6] Defendants claimed below that if Plaintiff's free speech argument is followed to its logical conclusion no attorney disciplinary proceedings could be brought (R. 10, Memo at 11). This claim overlooks the fact that HSCR 13 proceedings are essentially public proceedings while ordinary disciplinary proceedings brought pursuant to HSCR 2 are confidential proceedings pursuant to HSCR 2.22. Free speech issues just do not arise in ordinary disciplinary proceedings because of this confidentiality.

The Defendants habitually fall back on the argument that the Supreme Court of Hawaii will be able to vindicate Plaintiff's constitutional claims. This assertion that Plaintiff can avoid the significant chilling effect on his free speech by going through the HSCR 13 proceedings (R. 10, Memo at 13) overlooks the fact that it is the Supreme Court of Hawaii to which Plaintiff must look for vindication, the same Supreme Court which violated his free speech by its "final adjudication" of ineffective assistance of counsel in *State v. Clarke* without notice or hearing.

b. The Due Process Clauses of the fifth and fourteenth amendments.

An attorney's calling or profession is a property right subject to constitutional protection. *Ex parte Wall*, 107 U.S. (17 Otto) 265, 289 (1883). In addition, a person's good name, reputation, honor, or integrity is also a property right subject to constitutional protection. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

Thus, an attorney subject to serious disciplinary action is entitled to procedural due process. *In re Ruffalo*, 390 U.S. 544, 550 (1968) (disbarment). While the states have the power to control the practice of law in their courts, that power cannot be exercised so as to ignore federally protected rights such as fair notice to an attorney of any charges against him. *Strand v. Stewart*, 366 F. Supp. 1398, 1401 (E.D. Pa. 1973), *aff'd mem.* 547 F.2d 1164 (3d Cir. 1977).

The question naturally arises as to whether HSCR 13 is disciplinary or remedial in nature. While couched in

remedial language, the result of action taken under this rule clearly can be disciplinary. In *State v. Smith*, 68 Haw. ___, 712 P.2d 496 (1986), the Supreme Court of Hawaii had this to say about HSCR 13:

> We realize too that criminal trials could be turned by astute defense lawyers "into reversible trials by simply eliciting constitutionally impermissible [testimony] on direct examination.": *State v. Caudill*, 706 P.2d at 460. But we think Rule 13 of the rules of this court [footnote omitted] stands as a disincentive for competent attorneys to do so, since defense counsel rendering ineffective assistance in a criminal case may be subject to corrective action thereunder. Inasmuch as this may include a suspension of the attorney's license to practice law pending the completion of a prescribed course or courses of remedial education and other sanctions, the ploy would not be worth the candle.

68 Haw. at ___, 712 P.2d at 502-503.

Obviously, the result of action under this Rule can be disciplinary.

Defendants' claim that Plaintiff has suffered no reputational loss (R. 5, E.R. 214) is incredible in view of the massive publicity in Clarke's case (R. 6, E.R. 281-378). Harm to Plaintiff's good name, reputation, and law practice from being found ineffective or guilty of misconduct by the Supreme Court of Hawaii in the *Clarke* decision is inevitable in the relatively small community of Honolulu with its small criminal defense bar.[7] The ongoing HSCR

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[7] Defendants suggest that, as a matter of law, an appellate court opinion can never harm the reputation of a criminal

(Continued on following page)

13 proceeding only aggravates and increases the damage done by the decision.[8]

Here the damage to Plaintiff's good name, reputation and law practice arises from libel *per se*. In *Murphy v. Maui Publishing Co.*, 23 Haw. 804 (1917), the Supreme Court of Hawaii said that:

> "[I]t is libelous to impute to a member of any of the learned professions that he does not possess the technical knowledge necessary for the proper practice of such profession, or that he has

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(Continued from previous page)

defense attorney (R. 5, E.R. 214). If this were the law, a state appellate court would have the power to wrongfully destroy an attorney's reputation and be beyond the reach of the protections of the United States Constitution. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). State appeal courts are not beyond the reach of that protection. In addition, California (where Plaintiff is also a member of the bar (R. 6, E.R. 277), now requires its members of the bar to report to the State Bar of California any "[r]eversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or wilful misrepresentation by an attorney." California Business and Professions Code Section 6068(n)(7) (West 1987 Supp.).

[8] Defendants claimed below that HSCR 13 proceedings are confidential (R. 5, E.R. 212). While the hearing may be confidential, all pleadings excluding the special master's recommendation (but including the special prosecutor's recommendation) are filed as a public record with the Clerk of the Supreme Court of Hawaii in the appeal file of the case out of which the proceeding arose (R. 6, E.R. 424-426). Contrast this lack of confidentiality with the confidentiality mandated by HSCR 2.22 for disciplinary proceedings brought under HSCR 2.

> been guilty of professional misconduct." [Citations omitted.] When the natural and probable consequence of a printed libelous publication will injure one's professional reputation or cause him pecuniary loss, such publication is libelous *per se* [citation omitted]. A charge of malpractice or professional misconduct against a physician or attorney naturally tends to harm him in his profession and to deprive him of business by causing persons contemplating employing him to withhold their patronage from him. Naturally the extent of such loss is unknown to the injured party. The plaintiff in the case at bar says that he knows of no business he has lost by reason of the alleged libelous publication, but it is natural for a person contemplating employing a professional man, and deterred from so doing by reason of a charge of professional misconduct published against him, to refrain from going to him and telling him that he expected to employ him but did not do so because he saw that he had been charged with malpractice or professional misconduct. Delicacy naturally prevents one from approaching another under such circumstances. It is apparent that the tendency of the libelous article in question here is to cause pecuniary loss to the plaintiff. Whether he is able to point out just what business he has lost by reason of it or not we hold that the libelous publication complained of [accusing an attorney of settling a case without the knowledge or consent of his client] is actionable without allegation and proof of special damage.

Id. at 809-810.

See also Chow v. Alston, 2 Haw. App. 480, 484, 634 P.2d 430, 434 (1981); *Butler v. United States*, 365 F. Supp. 1035, 1044 (D. Haw. 1973); *Tagawa v. Maui Publishing Co.*, 49 Haw.

675, 679, 427 P.2d 79, 82 (1967); *Kahanamoku v. Advertiser Publishing Co.*, 25 Haw. 701, 709 (1920). That libel *per se* is subject to a defense of privilege does not alter the fact that a libel occurred. *See Chow v. Alston, supra.*

Defendants claim that Plaintiff was never found guilty of misconduct by the Supreme Court of Hawaii in its decision, and that he suffered no damage because his name nowhere appeared in that decision (R. 10, Memo at 4). This first claim is incomprehensible (the title of HSCR 13 refers to "final adjudication of ineffective assistance" resulting in a reversal of a criminal conviction) and will be discussed *infra*. Plaintiff is unsure of the relevance of the second claim when memorandum opinions of the Supreme Court of Hawaii as well as HSCR 13 pleadings are public record (R. 6, E.R. 280; R. 6, E.R. 425). Plaintiff, as Clarke's attorney, was specifically named in 23 newspaper articles and letters to the editor concerning *State v. Clarke* and its consequences (R. 6, E.R. 281-282). As to both of these claims, we need only look to the newspaper articles naming Plaintiff which arose from the decision of the Supreme Court of Hawaii in *State v. Clarke* to see the invalidity of Defendants' arguments (R. 14, E.R. 463-465).

c. The Right to Counsel Clause of the sixth amendment as made applicable to the states by the fourteenth amendment.

A defendant's right to counsel necessarily includes a corresponding right of a criminal defense attorney to practice his profession without unreasonable hindrance or else the defendant's right is meaningless. In examining these corresponding rights in the context of effective

assistance of counsel, it is important to determine what presumptions come into play and whether such presumptions have a constitutional basis. It is also important to establish what role a criminal defendant plays here. Further, the totality of the circumstances of any given case determines how this issue is approached.[9] As the Supreme Court of Hawaii said in *State v. Kahalewai*, 54 Haw. 28, 501 P.2d 977 (1972):

> In cases where the adequacy of counsel is in question, we must first examine the record with appellant's allegations in mind, to determine whether, viewed as a whole, the assistance provided appears to have been below the level of ordinary competence demanded of lawyers in criminal cases. If this examination shows that defenses crucial to appellant's case could have been, but were not raised, or that trial counsel inexplicably failed to assert appellant's constitutional rights, the case will be examined further to determine whether counsel's actions were the result of informed judgment or constitutionally inadequate preparation. The issue of informed judgment, on which appellant places so much emphasis, is only relevant where the actions or inactions resulting from that judgment seem unreasonable.

54 Haw. at 32, 501 P.2d at 980.

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[9] Defendants claim below that any constitutional right of Plaintiff to practice as a criminal defense attorney was not infringed in *State v. Clarke* (R. 10, Memo at 15). This argument is premised on the assumption that Plaintiff suffered no harm from the decision of the Supreme Court of Hawaii, an assumption which has already been shown to be false. It is the harm that Plaintiff suffered and continues to suffer as a *result* of the *Clarke* decision that gives rise to Plaintiff's sixth amendment claim and not any harm which might have occurred during Clarke's appeal.

And if the tactical decisions in the *Clarke* trial were based on "informed judgment," there was no basis for the Supreme Court of Hawaii to make the findings it did. *See People v. Aiken*, 380 N.E.2d 272, 275 (N.Y. 1978).

Of the five specific findings made by the Supreme Court of Hawaii (see *infra*), all but the fourth relate to actions *not* done by Plaintiff, and, as will be seen, each of these four can be waived by a defendant in a criminal case. The only problem here is that, from the record, it is impossible to tell if Clarke and Plaintiff made an informed judgment to waive the rights in question. And the Supreme Court of Hawaii was not interested in finding out if those decisions were based on "informed judgment."

As a matter of policy, there must be a strong presumption that a defense attorney has fully discharged his duty of effective representation, and one court has held that "it requires strong and convincing proof to overcome this presumption." *Crisp v. State*, 394 N.E.2d 115, 119 (Ind. 1979). In discussing this presumption, the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), said:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict

the wide latitude counsel must have in making tactical decisions.

* * *

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation omitted.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation omitted.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citation omitted.]

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid

requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

* * *

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. [Citation omitted.]

* * *

> Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

466 U.S. at 688-693 [emphasis added].

Obviously, in dealing with omissions by defense counsel, such as those involved here, without knowing what went on between attorney and client, the presumption cannot be overcome. However, the Supreme Court of Hawaii in *State v. Clarke* ignored its own precedent and, as to Plaintiff, created a conclusive presumption of ineffectiveness, all in violation of this presumption of competence, which clearly arises out of the sixth amendment.

So long as Clarke is unwilling to waive the attorney/client privilege, it is and will remain impossible to make "a proper assessment" of Plaintiff's trial decisions in *State v. Clarke*. However, one point can be made here. The Supreme Court of Hawaii, in effect, said that Plaintiff was intentionally incompetent in order to force a reversal of Clarke's conviction. If that had been true, Plaintiff would have withdrawn as Clarke's counsel after the trial so another attorney could have raised the issue of effectiveness of counsel on appeal. However, the issue was never raised by any of the parties. This premise of the Supreme Court of Hawaii is without any support in the record.

d. The Equal Protection Clause of the fourteenth amendment.

i. HSCR 13 is invalid on its face.

Fourthly, because HSCR 13 applies only to defense attorneys and not to prosecutors, it violates the Equal

Protection Clause of the fourteenth amendment.[10] Where a disciplinary rule, such as HSCR 13, is not applicable to all members of the bar, as is HSCR 2 (governing attorney discipline generally), it is appropriate to examine the validity of that rule. *Niles v. Lowe*, 407 F. Supp. 132, 136 (D. Haw. 1976).

The Equal Protection Clause only prohibits "invidious discrimination" by a state. *American Party of Texas v. White*, 415 U.S. 767, 781 (1974). As stated by the United States Supreme Court in *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954):

> Equal protection does not require identity of treatment it only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

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[10] For example, in the trial of *State v. Clarke*, the prosecution provided pre-trial discovery to the effect that there were no admissions by Clarke. However, the two prosecutors withheld from Clarke and his attorney (in violation of Rule 16(b)(1)(ii) of the Hawaii Rules of Penal Procedure) evidence of an admission by Clarke, waiting until after direct and cross-examination of the witness concerned to ambush the defense on redirect examination (R. 6, E.R. 400). Such conduct by a prosecutor constitutes reversible error, even if unintentional. *State v. Kutsen*, 67 Haw. 542, 696 P.2d 351 (1985). In *State v. Clarke*, the prosecutors' conduct was clearly intentional, yet they are not subject to HSCR 13. This issue was raised by Clarke in his Opening Brief in the Supreme Court of Hawaii (R. 1, E.R. 43).

Accord, *State v. Johnson*, 51 Haw. 195, 202-203, 456 P.2d 805, 809-810 (1969), *appeal dismissed*, 397 U.S. 336 (1970).

While HSCR 13 is obviously directed toward seeing that persons accused of crime have competent counsel, that cannot be the ultimate purpose. As found by the United States Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984):

> [T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. [Citations omitted.] Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs [citation omitted], the burden rests on the accused to demonstrate a constitutional violation.

Id. at 658 [footnotes omitted].

And there is a duty on the prosecution to see that a person accused of a crime receives a fair trial. *Berger v. United States*, 295 U.S. 78, 88 (1935); *United States v. Coast of Main Lobster Co., Inc.*, 538 F.2d 899, 902 (1st Cir. 1976); *United States v. Barker*, 553 F.2d 1013, 1024-25 (6th Cir. 1977). In fact, prosecutors are held to a higher standard of conduct in this regard than either private attorneys or public defenders. *United States v. Judge*, 625 F. Supp. 901, 902 (D. Haw. 1986).

Defendants argued below that there is a rational basis for treating defense attorneys differently from prosecutors in HSCR 13 (R. 10, Memo at 17-21). Four grounds are given in support of this argument.

First, it is claimed that the constitutional rights of persons accused of crime have no counterparts in the state, and thus the classification in HSCR 13 is rational. The problem with this analysis is that what is being compared are criminal defendants and prosecutors rather than criminal defense attorneys and prosecutors.

Second, Defendants say there is no need to include prosecutors in the scope of HSCR 13 because, as prosecutors are employed by the state, the state can teach the incompetent prosecutor to become competent.[11] The problem here is that there is not a shred of evidence that this is in fact done; and as any criminal lawyer knows, this is not done because prosecutorial incompetence (somewhat inappropriately called prosecutorial misconduct in the cases) usually results in convictions – not acquittals.[12] One need only look at the cases of prosecutorial incompetence (virtually every one a conviction) collected in the fourteen A.L.R., A.L.R. Fed., and L.Ed.2d annotations listed in the *amicus* memorandum (R. 16, E.R. 447-448) to see the extent of the problem. In fact, since November, 1986, the Supreme Court of Hawaii has faced this issue twice, the first of these cases resulting in a reversal. *State v. March*, 68 Haw. ___, 728 P.2d 1301 (1986); *State v. Hoke*, 68 Haw. ___, 731 P.2d 1261 (1987).

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[11] Defendants argue that the state has the extreme remedy available to it of discharging the incompetent prosecutor (R. 10, Memo at 19). In other words, the State can turn the incompetent prosecutor into an incompetent defense counsel by sending him or her into the private sector!

[12] The claim of the Chief Justice of Hawaii that prosecutorial incompetence usually results in acquittals (R. 10, E.R. 446) is beyond comprehension to the experienced criminal lawyer. How often have defense attorneys wished that were true!

Third, a sixth amendment right in and of itself in the criminal defense attorney is denied.[13] Clarke's sixth amendment right may have been vindicated *because* Plaintiff was successful in the appeal in *State v. Clarke*, but if Plaintiff as Clarke's counsel has no constitutional protection himself, the sixth amendment ultimately would have little meaning because the state would then be free to restrict the ability of the criminal defense attorney to practice his profession.

Fourth, HSCR 13 is viewed as "a useful vehicle to insure sound judicial administration." It is claimed that this is achieved by minimizing reversals based on ineffective assistance of counsel. It is further claimed that HSCR 13 ensures that guilty persons do not escape justice because of errors of their counsel. In fact, HSCR 13 promotes neither of these goals and in fact encourages the opposite results that those claimed.

In *State v. Clarke*, the reversal of the conviction was made without knowing whether Clarke agreed with Plaintiff's trial tactics. If Clarke had so agreed, then his conviction was reversed for the wrong reasons. By providing for HSCR 13 proceedings only *after* reversal, the Supreme Court of Hawaii has devised a procedure whereby a reversal of a conviction on the ground of

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[13] In response to suggestions for improvements to HSCR 13, the Chief Justice of Hawaii wrote a letter setting out the Supreme Court of Hawaii's view of the basis for the rule (R. 16, E.R. 443-446). This letter, which is cited a number of times in this Brief and which was cited by the District Court in its decision (R. 19, E.R. 471), is very illuminating in that there does not appear to be any understanding by the Supreme court of Hawaii that criminal defense attorneys have any rights at all.

ineffectiveness is a prerequisite for the determination of whether the defense attorney was in fact ineffective (and assuming that the triggering decision of the Supreme Court is *not* a "final adjudication") – a process which hardly minimizes reversals. Likewise, by guaranteeing at least some erroneous reversals, HSCR 13 means that guilty persons may indeed escape justice while the innocent defense attorneys may suffer. And this procedure virtually ensures that the effective defense attorney wrongfully subject to HSCR 13 proceedings will not have the assistance of his client in the HSCR 13 proceedings because the client would be forced to impeach the reversal to assist his attorney (R. 16, E.R. 437).

When one considers that prosecutors as well as defense counsel can cause the same harm to a defendant's right to a fair trial in a criminal case by either incompetence or misconduct, this classification in HSCR 13 is obviously wholly arbitrary. When this classification is put in context of the serious misconduct by the prosecutors in *State v. Clarke* (note 10 *supra*), the facial equal protection violation is beyond question.

ii. HSCR 13 is invalid as applied.

HSCR 13 has also been applied in a discriminatory fashion which violates the right to the equal protection of the laws. No HSCR 13 proceedings have been initiated against the former defense attorney who was found to have been incompetent by this Court in *Iaea v. Sunn*, 800 F.2d 861 (9th Cir. 1987), notwithstanding that HSCR 13 clearly applies on its face to this particular attorney (who

is now a Hawaii state judge) (R. 6, E.R. 382-388; R. 14, E.R. 466-467).[14]

Discriminatory enforcement of a law is as subject to the constitutional right of equal protection as a discriminatory classification enshrined within a law. *Rogers v. Alabama*, 192 U.S. 226, 231 (1904); *Little v. Streater*, 452 U.S. 1, 16 (1981). To succeed as to this issue, Plaintiff must show "an arbitrary and intentionally unfair discrimination in the administration" of HSCR 13. *Mackay Telegraph & Cable Co. v. City of Little Rock*, 250 U.S 94, 100 (1919). The "element of intentional or purposeful discrimination" must be proved, but it "may appear on the face of the action taken with respect to a particular class or person." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

Here, there is no dispute that there has been discriminatory enforcement of HSCR 13. The Supreme Court of Hawaii has justified this discrimination with a claim that "it is questionable" whether the Supreme Court can order the offending attorney to comply with HSCR 13 (R. 14, E.R. 466). This justification for failing to proceed where the ineffectiveness occurred in state court, but where a federal court made the finding, is a sham. The Supreme Court of Hawaii has previously held that it is no defense to a state attorney disciplinary proceeding that the offending conduct relates to a case in federal court. If the offending attorney is licensed in Hawaii, that attorney's conduct is ever a concern of the Supreme Court of Hawaii. *In re Bouslog-Sawyer*, 41 Haw. 403, 425-426 (1956),

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[14] There have been only three HSCR 13 proceedings ever initiated since the rule was adopted in July 1985 (R. 6, E.R. 424).

aff'd sub nom. In re Sawyer, 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds*, 360 U.S. 622 (1959).

e. Summary

These enumerated violations of Plaintiff's constitutional rights are more than "threats of injury" which are "merely conjectural" as claimed by Defendants (R. 5, E.R. 214). The "Chilling effect" on the right to counsel has already occurred. The harm to Plaintiff and to his reputation to a large degree is done, it having resulted directly from the decision of the Supreme Court of Hawaii. If there is any doubt about the harm done to Plaintiff's reputation, one need only look at the front page story in the Honolulu *Advertiser* of April 15, 1987 (R. 6, E.R. 372-373). The identification of Plaintiff with the attorney awaiting discipline who was the subject of that very embarrassing story is itself very serious damage to Plaintiff's reputation.[15]

The Special Master has no power under HSCR 13 to undo this harm, and, as will be discussed, it is not reasonable to believe that the Supreme Court of Hawaii will undo that harm. Further, Plaintiff had no means of direct review of the decision of the Supreme Court of Hawaii in *State v. Clarke* because he would have been placed in a conflict of interest with Clarke, who obviously benefitted from the result in his appeal.

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[15] The reports of both the Special Master and the Special Prosecutor in those HSCR 13 proceedings were a public record (R.6, E.R. 280). The Special Master recommended that this attorney be required to go back to law school and retake his first year of law study!

It should be kept in mind that the "typical case" involving the issue of ineffective assistance of counsel arises out of a convicted defendant's complaint against his trial defense attorney – a complaint which has the effect of waiving the attorney/client privilege.[16] *In re Gray*, 176 Cal. Rptr. 721 (App. 1981); *see* Rule 503, Hawaii Rules of Evidence. In both *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and *State v. Antone*, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980) (cited by the Supreme Court of Hawaii in *State v. Clarke*), it was stated that the burden is on a criminal defendant to establish his ineffectiveness claim. HSCR 13 was no doubt drafted with the situation in mind where a defendant raises this issue and it is fully litigated. Presumably, the trial defense counsel will have had an opportunity to explain his trial decisions. To apply HSCR 13 where (1) the ineffectiveness issue was not raised or litigated, (2) the attorney accused of the incompetence or misconduct was denied a hearing before being adjudged incompetent or guilty of misconduct, and (3) the convicted defendant has invoked the attorney/client privilege so that the attorney cannot carry the burden to explain which is imposed upon him, HSCR 13 obviously brings these constitutional questions into a clear focus.

Further issues are raised by the Special Master's failure to follow his mandate as to the strict time limits of HSCR 13; time limits which should have expired before

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[16] Clarke's letter to the state Circuit Court requesting a hearing on the state trial judge's complaint against Plaintiff (R. 1, E.R. 155-156) could be construed as such a waiver, but Clarke withdrew any "complaint" after his first conviction was reversed (R. 6, E.R. 423).

the end of 1986. This brings us to the question of relief under 42 U.S.C. Section 1983.

2. Relief Under 42 U.S.C. Section 1983.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the United States Supreme Court stated that:

> [Section] 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any [section] 1983 action the initial inquiry must focus on whether the two essential elements to a [section] 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.

451 U.S. at 535.

In particular, specific intent to violate constitutional rights is not an essential element of a Section 1983 claim. *Allison v. Wilson*, 434 F.2d 646, 647 (9th Cir. 1970).

There is no doubt that Defendants have been acting "under color of state law" as they have been acting pursuant to HSCR 13. The only question is whether there has been a deprivation of "rights, privileges, or immunities secured by the Constitution or laws of the United States." And this question depends on whether HSCR 13, both on its face and as applied to Plaintiff, offends the first, fifth, sixth and/or fourteenth amendments. Plaintiff has shown clear violations of rights secured by these amendments. Where irreparable injury to an attorney's

due process rights in state disciplinary proceedings is shown, a federal court may interfere under Section 1983 with pending state disciplinary proceedings. *Niles v. Lowe*, 407 F. Supp. 132, 136 (D. Haw. 1976).

3. Younger Abstention.

The Defendants argued below, and the District Court found, that abstention under *Younger v. Harris*, 401 U.S. 37 (1971), was mandated in this case. In examining a defendant's request for abstention, several fundamental principles apply: (1) abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy before it, (2) it can only be justified in the exceptional circumstances where resort to the state proceeding would clearly serve an important countervailing state interest, and (3) only the clearest of justifications will warrant dismissal. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 14-17 (1983).

In addressing whether the federal courts should abstain from interfering with attorney disciplinary proceedings, the United States Supreme Court in *Middlesex Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), held that the pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise constitutional claims. Abstention is not required where it plainly appears that the state procedure would not afford adequate protection. 457 U.S. at 436. See, Annotation, *Actionability Under Federal Civil Rights Acts with Respect to Proceedings to Discipline Attorney, to Regulate Admission to Practice Law, or to Restrain Unauthorized Practice of Law*, 9 A.L.R.Fed. 422 (1971).

Following the text of this Brief is a chart comparing the New Jersey Supreme Court Rule in question in *Middlesex* with Hawaii Supreme Court Rules 2 (the rule relating to attorney discipline generally) and 13. This chart is offered to assist the court while following Plaintiff's arguments.

Younger abstention in this case depends on the adequacy of the HSCR 13 procedure beginning with the decision of the Supreme Court of Hawaii in *State v. Clarke*. Defendants, however, misapply the *Middlesex* test to the facts of the instant case. They apply it prospectively only and then only in terms of procedural due process by only addressing this question – *will* Plaintiff have an adequate opportunity to raise the federal constitutional issues in the HSCR 13 proceeding? The problem here is that this is not the principal question in this case because procedural due process in the HSCR 13 proceedings is but one issue, and a relatively minor issue at that.

The real issue in this case is primarily one of substantive due process and is both prospective *and* retroactive. The questions which must be asked in this case are (1) *did* Plaintiff have an adequate opportunity to raise these issues before the "Final Adjudication" of misconduct by the Supreme Court of Hawaii, and (2) if he did not have such an opportunity, *can* he ever have an adequate opportunity to raise these issues in the HSCR 13 proceeding?

The right to due process is a right to both procedural and substantive due process. Substantive due process requires "a fair trial in a fair tribunal" whether the proceeding be criminal or administrative. *Withrow v. Larkin*, 421 U.S. 43, 46 (1975); *Peters v. Kiff*, 407 U.S. 493, 501

(1972); *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, this aspect of due process has two aspects – fair trial and fair tribunal.

a. Fair Trial

"The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944). And when serious disciplinary proceedings against an attorney are involved, procedural due process requires fair notice of the charge and that notice must be known *before* the proceedings commence. *In re Ruffalo*, 390 U.S. 544, 550-551 (1968); *Selling v. Radford*, 243 U.S. 46, 51 (1917); see *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

While notice and opportunity to be heard should normally precede any deprivation of constitutional rights, two limited exceptions exists as to property rights which permit a post deprivation remedy: where there is "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process." *Parratt v. Taylor*, 451 U.S. 527, 538-540 (1981). Quite clearly, neither exception is applicable here. In fact, Plaintiff sought a predeprivation hearing from the Supreme Court of Hawaii by way of motion to the court to remand Clarke's appeal to the trial court (based on the state trial judge's complaint against Plaintiff with the Office of Disciplinary Counsel). Not only could the Supreme Court of Hawaii have granted such a hearing by granting the motion, but the proper procedure where the

ineffectiveness of trial counsel is raised for the first time on appeal is a remand to the trial court. *State v. van Cleave*, 716 P.2d 580, 583 (Kan. 1986).[17]

In the instant case, Plaintiff had no notice or hearing prior to the "final adjudication" in *State v. Clarke* by which the Supreme Court of Hawaii deprived him of his constitutional rights. This issue is totally retroactive because the harm was complete shortly after the filing of the decision of the Supreme Court of Hawaii in *State v. Clarke*. It is of little consolation to Plaintiff that the Special Master can consider Plaintiff's constitutional claims when the Special master is powerless to remedy the harm already done. HSCR 13 is a postdeprivation remedy in a situation in which due process requires a predeprivation remedy, a remedy Plaintiff would have been entitled to if proceedings had been brought pursuant to HSCR 2.7.

b. Fair Tribunal

It is well established that abstention is inappropriate where the adjudicatory body is biased against the party concerned. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). The United States Supreme Court in *In re Murchison*, 349 U.S. 133 (1955), held that:

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[17] Had the Supreme Court of Hawaii followed the proper procedure, Plaintiff would have had the benefit of his client's testimony at the hearing (R. 6, E.R. 275-276). With his conviction reversed, Clarke no longer had any interest in testifying and he has invoked the attorney/client privilege. Also, HSCR 13 places the burden on Plaintiff to prove his effectiveness, a burden he cannot meet because the attorney/client privilege prevents him from explaining his actions.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." [citation omitted.] Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." [Citation omitted.]

349 U.S. at 47.

In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Supreme Court expanded on this, saying that:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice

must be forbidden if the guarantee of due process is to be adequately implemented.

421 U.S. at 47.

Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice.

421 U.S. at 54.

Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.

The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency

> *makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.*

421 U.S at 57-58 [emphasis added].

In the instant case, the decision of the Supreme Court of Hawaii was not a mere finding of probable cause, but a "final adjudication" of misconduct resulting in the reversal of Clarke's conviction.[18] A finding of "not guilty" in the HSCR 13 proceedings (assuming such a finding is even permitted) would be totally incompatible with the "final adjudication" reversing Clarke's conviction. Defendants claimed below that it is a "given" that the Supreme Court of Hawaii, as the ultimate trier of law and fact, E.R. would entertain Plaintiff's constitutional challenges (R. 5, 209-210), and the District Court found that the rule in *Withrow v. Larkin* can be extended to the instant situation where a favorable result to Plaintiff would be totally incompatible with the finding that triggered the HSCR 13 proceeding (R. 19, E.R. 471-472). *Withrow v. Larkin*, by clear implication, stands for the rule that there is a denial of due process where the accusatory finding is incompatible with any of the possible adjudicatory findings. The

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[18] HSCR 13 is entitled "Proceedings Following *Final* Adjudication of Ineffective Assistance of Counsel in Criminal Cases." [Emphasis added.] In construing a law, the title may be resorted to for the purpose of ascertaining the meaning of the law. *Spears v. Honda*, 51 Haw. 1, 17, 449 P.2d 130, 139 (1968), *reh'g denied*, 51 Haw. 103, 449 P.2d 130 (1969).

District Court twisted the reasoning of *Withrow v. Larkin* to achieve a result contrary to the clear intent of the United States Supreme Court. Further, with the Supreme Court of Hawaii already having once denied Plaintiff both notice and a hearing, it is most certainly not a "given" that the Court would now fairly hear Plaintiff's claims.

One need only look to the extensive publicity arising out of *State v. Clarke* to see that the Supreme Court of Hawaii is hopelessly "wedded" to its findings against Plaintiff. There were 62 articles, 12 letters to the editors, and 5 editorials which appeared in Honolulu's two major newspapers related to *State v. Clarke* (R. 6, E.R. 281-378). The comments of the state trial judge at Clarke's first sentencing (R. 6, E.R. 326-329, 333-334), the public outcry and debate resulting from *State v. Clarke* (R. 6, E.R. 307-325, 330-332, 334-339), and the subsequent grand jury and agency investigations of the social workers involved (R. 6, E.R. 340-354) are strong indications that the Supreme Court of Hawaii is hardly about to admit that it erred in finding Plaintiff guilty of misconduct warranting the reversal of Clarke's conviction.[19] And only by admitting that it erred in reversing Clarke's conviction on

[19] It is even less likely that the Special Master (who is a member of the bar) is ever going to find that the Supreme Court (which appointed him) was in error in reversing Clarke's conviction for the reason that it did. The Chief Justice of Hawaii claims that HSCR 13 provides for a *de novo* proceedings before the Special Master (R. 16, E.R. 445), but HSCR 13 contains no such provision and this claim is inconsistent with the title of HSCR 13 which refers to the triggering decision as a "final adjudication."

the grounds that it did can the Supreme Court of Hawaii vindicate Plaintiff. Such an admission would set off a firestorm of recrimination and generate much adverse publicity and public outrage.

The District Court accepted (R. 19, E.R. 468-473) what is in essence the principal argument of Defendants – that the "final adjudication of ineffective assistance of counsel" by the Supreme Court of Hawaii which resulted in the reversal of Clarke's conviction was only a finding that Clarke was denied the effective assistance of counsel and *not* a finding that Plaintiff was ineffective as Clarke's counsel. Even if one overlooks the express language "final adjudication" in the title of HSCR 13, it defies logic to claim that Clarke could have been denied the effective assistance of counsel warranting reversal of his conviction without that finding also being a finding that his attorney was ineffective. Defendants' position on this point is nonsense.[20]

The problem with HSCR 13 is not the type of proceedings provided for, but the *timing* of the proceedings. The District Court and Defendants failed below to respond in any way to this issue of the necessity of a

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[20] The entire HSCR 13 proceeding reminds one of Alice's trial in Lewis Carroll's *Alice's Adventures in Wonderland* at 106-61 (Bramhall House 1960):

> Let the jury consider their verdict," the King said, for about the twentieth time that day.
>
> No, no!" said the Queen. "Sentence first – verdict afterwards."

With HSCR 13, it is verdict first – trial afterwards!

pre-deprivation of rights hearing, and they have failed to justify even to the slightest degree the HSCR 13 post-deprivation of rights procedure. Plaintiff has been pre-judged by the Supreme Court of Hawaii. There is no chance of Plaintiff receiving due process through the Supreme Court's action on the Special Master's recommendation which under the terms of HSCR 13 can relate only to the "penalty" to be imposed. This case is not only ripe for federal intervention; if anything, it is very over-ripe.[21]

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[21] Defendants also argued for abstention under the Pullman Doctrine, claiming that action by the Special Master or Supreme Court of Hawaii may "obviate or significantly modify the federal questions presented" (R. 5, E.R. 211-213). However, Pullman abstention only applies where the issue of state law is uncertain and which only a state tribunal could authoritatively construe. *Wisconsin v. Constantineau*, 400 U.S. 433, 438-439 (1971).

As noted, HSCR 13 contains no provision for notice and hearing prior to a defense attorney being finally adjudicated as ineffective because of incompetence or misconduct, and the postdeprivation HSCR 13 proceedings in this case do not provide due process. There is no ambiguity as to predeprivation due process in HSCR 13, and "[t]here are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some constructions but not under others." 400 U.S. at 438.

HSCR 13 is unconstitutional on its face, not only as a violation of due process, but also as a violation of the sixth amendment as well as equal protection. The Pullman Doctrine has no application in this case.

The blatant unconstitutionality of HSCR 13 also can provide the "exceptional circumstances" necessary to defeat a claim of Younger abstention. *Middlesex County Ethics Committee v. Garden State Bar Association*, 456 U.S. 423, 431 (1982).

4. The Specific Findings of the Supreme Court of Hawaii

It is appropriate to examine the decision of the Supreme Court of Hawaii in *State v. Clarke*. That decision in its entirety stated:

> This is an appeal from a conviction for murder in violation of HRS [Section] 707-701. The victim was the infant child of appellant's live-in girl friend.
>
> Appellant raises numerous grounds on appeal, none of which we reach or decide because, in our view, the record is clear that the appellant did not have the effective assistance of counsel at trial and that therefore we must reverse and remand for a new trial.
>
> The State's case against the appellant rested on circumstantial evidence. It is apparent from the record that a possible defense, contemplated by appellant and his counsel, was that the actual culprit was the mother. At oral argument, appellant's counsel suggested that another possible defense was that, while appellant might have inflicted the fatal abuse, he lacked the necessary intent to cause the child's death.
>
> We are faced with a record in which appellant's trial counsel (1) refused to make an opening statement; (2) refused to cross-examine the mother of the victim, counsel's stated reason being that certain records with respect to the witness had not been made available to him; (3) subsequently refused to call the witness himself after the records were made available to him;[1] (4) elicited testimony from two prosecution witnesses that they believed that the appellant was guilty; and (5) refused to make a closing argument.

At oral argument, appellant's counsel asserted that each of the above decisions was justifiable as a matter of tactics. We cannot agree. In our view, on this record, none of the five alleged tactical decisions which we have enumerated above (let alone all five considered together) was within the range of competency demanded of attorneys in criminal cases. *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980). The effect was to substantially impair what defenses appellant had. *Antone, supra.*

We remind both counsel of their obligations under HSCR 13 once a judgment on appeal has been issued by us in this case. Reversed and remanded.

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[1] Under HRE 607, counsel could have impeached her testimony.

To place this case in perspective, it is necessary to look at the underlying facts from the trial in *State v. Clarke*. The relevant facts were set out in the Statement of the Case in Clarke's Opening Brief (written by Plaintiff) in the Supreme Court of Hawaii (R. 6, E.R. 389-406) and accepted by Appellee State of Hawaii in its Answering Brief pursuant to Rule 28(c) of the Hawaii Rules of Appellate Procedure (R. 1, E.R. 3; R. 6, E.R. 276). It is essential that this Court know what happened in the trial in *State v. Clarke* in order to understand what followed. The Statement of the Case from Clarke's Opening Brief in the Supreme Court of Hawaii is included as the Appendix to this Brief.

A reading of these facts shows a state trial judge who abandoned his impartial role and assumed the role of prosecutor. Further, the state prosecutors at the trial were

guilty of serious misconduct (e.g., note 10 *supra*). One is left, after reading those facts, with the inescapable conclusion that Clarke's conviction had to be reversed, if for no other reason, because of the accumulated error. The Supreme Court of Hawaii, however, without addressing any of the nine points raised by Clarke as grounds for reversal, *sua sponte* found five specific instances of ineffectiveness (apparently deliberate), any *one* of which standing alone substantially impaired Clarke's defense.[22]

It is important to note that, with the exception of the fifth finding, it is unknown what role Clarke played in the tactical decisions made at his trial. As already shown, the effect of the decision of the Supreme Court of Hawaii was to create a conclusive presumption of incompetence or misconduct by Plaintiff without regard for why Plaintiff acted as he did[23] and without regard for whether Clarke knowingly and intelligently agreed to those tactics. When one realizes that a defendant can waive virtually all of his trial rights by pleading guilty, it can be seen that this holding is truly extraordinary, particularly when the Supreme Court of Hawaii found that *any* one of the five tactics was *per se* ineffective. It should never be overlooked that a passive defense in a criminal case can be quite appropriate. *United States v. Sanchez*, 790 F.2d

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[22] Notwithstanding that under *State v. Antone*, 62 Haw. 346, 348, 615 P.2d 101, 104 (1980), it is the burden of the defendant to establish the ineffectiveness.

[23] Note that DR 7-101(B)(1) provides that:

> In his representation of a client, a lawyer may where permissible exercise his professional judgment to waive or fail to assert a right or a position of his client.

245, 253 (2d Cir. 1986). Now to look at each of the five findings.

a. Plaintiff Refused to Make an Opening Statement.

"The decision of whether to make an opening statement to the jury is particularly within the realm of trial strategy." *Commonwealth v. Tarver*, 384 A.2d 1292, 1295 (Pa. Super, 1978); *see also State v. Kraft*, 539 P.2d 254, 257-258 (Idaho 1975); *Gilliard v. State*, 462 So.2d 710, 716 (Miss. 1985). A defense attorney may waive opening statement as a matter of routine trial strategy. *Crisp v. State*, 394 N.E.2d 115, 119 (Ind. 1979); *People v. Pangelina*, 199 Cal. Rptr. 916, 918-919 (App. 1984). Thus, the ineffectiveness of counsel is not necessarily established where there is a failure to make an opening statement. *State v. Renshaw*, 347 A.2d 219, 226 (Md. 1975); *People v. Aiken*, 380 N.E.2d 272, 275 (N.Y. 1978); *People v. Huffman*, 139 Cal. Rptr. 264, 270 (App. 1977); *United States v. Robinson*, 502 F.2d 894, 896 (7th Cir. 1974). That an opening statement may be waived has been expressly recognized by the Hawaii Intermediate Court of Appeal. *State v. Gutierrez*, 1 Haw. App. 268, 271, 618 P.2d 315, 317 (1980). The cases relating to this issue are collected in Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Argument*, 6 A.L.R.4th 16 (1981).

b. Plaintiff Refused to Cross-Examine the Mother of the Victim.

This finding is patently misleading. During Clarke's trial, which lasted several weeks, the prosecution misled

the Family Court, before whom a motion for discovery of records was pending, into believing that the mother of the victim would not be called by the State until the following week. However, the next day in the Circuit Court trial, the prosecution announced it was calling the mother immediately. The trial judge ruled that Plaintiff would have to cross-examine without the Family Court records, and Plaintiff refused claiming he would be acting incompetently to cross-examine without the records. When the records were released to Plaintiff the following Monday (and the State was still presenting its case), the trial judge refused to permit the mother to be recalled so Plaintiff could cross-examine her using the records.

The Supreme Court of Hawaii has recognized that "counsel must 'conduct careful factual and legal investigation and inquiries with a view to developing matters of defense in order that he may make informed decision on his client's behalf.'" *State v. Kahalewai*, 54 Haw. 28, 30, 501 P.2d 977, 979 (1972); *see Strickland v. Washington*, 466 U.S. 668, 690-691, *reh'g denied*, 467 U.S. 1267 (1984). Yet, the Supreme Court of Hawaii in *State v. Clarke* found it to be ineffective for defense counsel to refuse to cross-examine in ignorance rather than wait the few days (while the State's case continued) in order to make an informed cross-examination. In view of the conduct of the prosecution, this holding is beyond comprehension, especially when a court's refusal to permit a defendant to reserve cross-examination has been held to be reversible error. *Craig v. State*, 594 S.W.2d 91 (Tex. Cr. App. 1980).

c. Plaintiff Refused to Call the Mother as Clarke's Witness.

There is no burden or duty on a defendant in a criminal case to call any witnesses. *United States v. Turchick*, 451 F.2d 333, 359 (8th Cir. 1971); *United States v. Ivey*, 546 F.2d 139, 144 (5th Cir.), *reh'g denied*, 550 F.2d 243 (5th Cir. 1977); *see* 1 Devitt & Blackmar, *Federal Jury Practice and Instructions*, Section 11.14 (3d ed. 1977). A defendant may rely on a failure of proof by the government. HAWJIC 2.4, CALJIC 2.61. After all, the right to call witnesses is a right independent of the right to confront and cross-examine government witnesses, and this is a right of a criminal defendant, not a duty imposed on a defendant.

If there is no duty on a defendant to call any witnesses at a criminal trial, then a defendant and his lawyer have the right to decide not to call a particular witness as in Clarke's trial. The reasons for not calling a particular witness are many, but in Clarke's trial, one reason can readily be deduced for Clarke not calling the mother of the victim. As noted above, the state trial judge probably committed reversible error in denying Plaintiff the right to cross-examine the mother after discovery had been provided. If Clarke would have chosen to call the mother as his own witness, he would have incurred the considerable risk that he might cure this error thereby losing probable reversible error on appeal. The law does not require that a defense attorney take affirmative action later in a trial to cure an earlier erroneous ruling by the judge to which proper objection had been interposed. *United States v. Heinel*, 9 U.S.C.M.A. 259, 262, 26 C.M.R. 39, 42 (1958). This type of tactical decision is the kind that

a defense counsel may make. See *People v. Aiken*, 380 N.E.2d 272, 275 (N.Y. 1978). In fact, this is a decision that the defense counsel may make without the consent of the defendant. *State v. DeGuzman*, 68 Haw. 14, 17, 701 P.2d 1287, 1291 (1985). Other reasons may have existed for this tactical decision, but the Supreme Court of Hawaii clearly was not interested in discovering them.

Finally, there is the problem presented by the fact that the disciplinary rules forbid an attorney to call a witness when the attorney knows that the witness is going to give perjured testimony or false evidence. *State v. DeGuzman, supra*. In view of the mother's testimony on direct and Clarke's plea of innocence, Plaintiff could hardly have expected that the mother would have told the truth. Thus, Plaintiff could not have called the mother and impeached her as the Supreme Court of Hawaii suggested in its decision. Here again, the attorney/client privilege prevents Plaintiff from explaining.

d. Plaintiff Elicited Testimony from Two Prosecution Witnesses that They Believed Clarke Was Guilty.

It is well established that there is the right to show the bias of a witness. *State v. Murphy*, 59 Haw. 1, 17, 575 P.2d 448, 459 (1978); Rule 609.1, Hawaii Rules of Evidence. It can be reversible error to not permit a wide range of cross-examination in regard to a witness' motives, interest, or animus in giving evidence. *Simmons v. Wainwright*, 271 So.2d 464, 465 (Fla. App. 1973). See *Territory v. Lewis*, 39 Haw. 635, 636 (1953); Annotation, *Preventing or Limiting Cross-Examination of Prosecution's Witness as*

to His Motive for Testifying, 62 A.L.R.2d 610, 661-664 (1958). And it is very relevant in a criminal case to show that a witness has a desire to see that the defendant is convicted. *Lanham v. State*, 269 S.W. 799, 800 (Tex. Crim. App. 1925); *State v. Adams*, 14 La. Ann. 620 (1859).

A reading of the relevant transcript extracts from the trial in *State v. Clarke* (R. 6, E.R. 407-417) shows clearly that this is what Plaintiff was doing in eliciting the testimony he did from *three*, not two, state witnesses (see R. 6, E.R. 276-277). To find such questioning ineffective on the facts of Clarke's case is to find the competent attorney incompetent and place the sixth amendment right to counsel in jeopardy. The record on this point in Clarke's case speaks for itself. This finding of the Supreme Court of Hawaii is patently unsupportable.

e. Plaintiff Refused to Make a Closing Argument.

Of the five findings, this is the only one for which it is known from the record that Clarke agreed as a trial tactic. First, Plaintiff stated that both he and Clarke felt that a closing argument would be a waste of time, and therefore it was waived. Second, Clarke in his letter to the state trial court requesting a hearing[24] stated that he had agreed with Plaintiff's advice recommending waiver of the closing argument as a tactic.

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[24] As previously noted, where ineffective assistance of counsel is raised for the first time on appeal, the proper procedure is a remand to the trial court for a hearing on this issue. *State v. van Cleave*, 716 P.2d 580, 583 (Kan. 1986).

Closing argument, as in the case of an opening statement, can be waived as a trial tactic. *State v. Renshaw*, 347 A.2d 219, 226-227 (Md. 1975); *People v. McMullen*, 403 N.E.2d 539, 544 (Ill. App. 1980); *State v. Chee*, 680 P.2d 1232, 1234 (Ariz. App. 1984); *People v. Diggs*, 223 Cal. Rptr. 361, 368 (App. 1986); *People v. Gaines*, 25 Cal. Rptr. 448, 450 (S.Ct. 1962). The cases relating to this issue are collected in Annotation, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Argument*, 6 A.L.R.4th 16 (1981).

f. Summary

What Plaintiff has shown by the above analysis is that what he did at Clarke's trial *may* have been legitimate trial tactics. Plaintiff does *not* ask this Court to find that these things were legitimate trial tactics. He does say, however, that the Supreme Court of Hawaii had no basis to find to the contrary in the absence of a waiver of the attorney/client privilege by Clarke.

VI. CONCLUSION

What the Supreme Court of Hawaii did to Plaintiff in *State v. Clarke* is in the nature of a judicial bill of attainder. Acting as the agents of the Supreme Court of Hawaii, Defendants – under color of state law, i.e., the decision of the Supreme Court of Hawaii and HSCR 13 – have denied Plaintiff his rights under the first, fifth, sixth, and fourteenth amendments and are continuing to deny him his constitutional rights.

Plaintiff is entitled to the relief he sought below. Here, even if he is now afforded a HSCR 13 hearing,

Plaintiff cannot defend himself because he has already been finally adjudged and the attorney/client privilege has silenced him. Further, Plaintiff cannot obtain vindication through the HSCR 13 process for the deprivation of his rights and the harm suffered by him. Proceeding against a defense attorney in the absence of a waiver of the privilege is in and of itself unconstitutional as a violation of due process and the sixth amendment; and this situation is aggravated by the denial of notice and a hearing prior to the "final adjudication" of ineffectiveness. The chilling effect of the HSCR 13 procedure invoked by the Supreme Court of Hawaii on vigorous and ethical representation of persons accused of crime is frightening. The judgment below should be reversed and the case remanded with instructions to deny Defendant's Motion to Dismiss and to grant Plaintiff's Motion for Summary Judgment on all causes of action.[25]

DATED: Honolulu, Hawaii, October 2, 1987.

/s/ Boyce R. Brown, Jr.
BOYCE R. BROWN, JR.
PETER C. WOLFF, JR.
Attorneys for Plaintiff

/s/ Earle A. Partington
EARLE A. PARTINGTON
Plaintiff Pro Se

[25] Even if Defendants were to prevail in this appeal, dismissal is too extreme a remedy. A stay of proceedings pending outcome of the HSCR 13 proceeding would be more appropriate because it would be inevitable that Plaintiff would have to return to federal court to find appropriate relief. If Plaintiff must submit to the HSCR 13 proceedings, his *entire* submission would be the record in the instant case (R. 14, E.R. 461-462).

A COMPARISON OF HAWAII AN
RELATING TO ATTORNEY
MIDDLESEX COUNTY ETHICS COMMITTEE v.

PART A: SUBST

	NJSCR 1:20	
1	Applies to all attorneys.	Applies to all att
2	General rule of confidentiality [1982 Rule 1:20-5(d), now Rule 1:20-10].	General rule of co
3	A *pre*-deprivation of rights proceeding. Only a complaint is necessary to initiate it; there is no prejudgment [1982 Rule 1:20-2(e), now Rule 1:20-3(e)].	A *pre*-deprivation a complaint is ne is no prejudgmen
4	Local District Ethics Committee receives complaint [1982 Rule 1:20-2(d), now Rule 1:20-3(d). See 457 U.S. at 426].	Disciplinary Cour ceives complaint
5	Burden of proof on complainant [1982 Rule 1:20-2(k), now Rule 1:20-3(f)].	Burden of proof o derance of eviden

) NEW JERSEY SUPREME COURT RULES
DISCIPLINE WITH CITATIONS TO
ARDEN STATE BAR ASSOCIATION, 457 U.S. 423 (1982)
ANTIVE DIFFERENCES

HSCR 2	HSCR 13
rneys.	Applies *only* to criminal defense attorneys.
fidentiality [Rule 2.22(a)].	No provision for confidentiality.
t rights proceeding. Only essary to initiate it; there	A *post*-deprivation of rights proceeding. More than complaint required; precondition is "final adjudication of ineffective assistance of counsel" which results in reversal of conviction; in other words, a prejudgment is necessary.
el of Supreme Court re- Rule 2.7(a)].	There is no complaint; the decision of the Supreme Court reversing the conviction is a "final adjudication" of the "guilt" phase of the proceedings.
complainant by prepon- e [Rule 2.7(b)].	Burden of proof on attorney finally adjudicated by the decision of the Supreme Court to have been ineffective to show that "corrective action" should not be taken. The proceedings are essentially "penalty" phase proceedings, the "guilt" phase having been completed with the decision of the Supreme Court reversing the conviction.

NJSCR 1:20

6.	Complaint assigned to attorney member of Committee to report and make recommendation as to guilt and penalty [1982 Rule 1:20-2(b), now Rule 1:20-3(f). See 457 U.S. at 426].	Disciplinary makes report guilt and pena
7.	Decision to proceed with the complaint made by Committee chairperson [1982 Rule 1:20-2(b), now Rule 1:20-3(f). See 457 U.S. at 426].	Member of Di Court determi recommendati [Rule 2.7(a)].
8.	If complaint is issued by Committee, it must state name of complainant, describe the claimed improper conduct, and cite the relevant rules [1982 Rule 1:20-2(i), now Rule 1:20-3(h). See 457 U.S. at 426].	Complaint is which shall be to inform the leged miscond
9.	Attorney whose conduct is challenged is served and has ten days to answer [1982 Rule 1:20-2(j), now Rule 1:20-3(i). See 457 U.S. at 426].	Attorney who served and has 2.7(b)].
10.	Unless good cause appears for referring the complaint to another Committee member, each complaint is referred to the member of the Committee who	No equivalent view in New before hearing

CEDURAL COMPARISON

HSCR 2	HSCR 13
ounsel of Supreme Court nd recommendations as to ty [Rule 2.7(a)].	Special master appointed by Supreme Court makes report and recommendation as to "corrective action" to be taken. "Guilt" was finally adjudicated in decision of Supreme Court reversing the conviction.
ciplinary Board of Supreme es if Disciplinary Counsel's n to proceed is implemented	Decision to proceed made by Supreme Court in decision reversing conviction.
ged by filing of "petition ufficiently clear and specific accused attorney] of the al- ct." [Rule 2.7(b).]	Proceedings initiated by Supreme Court decision reversing conviction for ineffective assistance of counsel. Attorney informed only of decision of Supreme Court reversing conviction.
e conduct is challenged is twenty days to answer [Rule	Attorney whose conduct is challenged is served with decision reversing conviction and has 45 days to answer.
rocedure to this second re- ersey. Formal hearing held committee [Rule 2.7(b)].	No equivalent procedure to this second review in New Jersey. Formal hearing held before Special Master.

conducted the initial investigation for review and further investigation, if necessary. The Committee member submits a written report stating whether a prima facie indication of unethical or unprofessional conduct has been demonstrated. The report is then evaluated by the chairman of the Ethics Committee to determine whether a prima facie case exists. Absent a prima facie showing, the complaint is summarily dismissed. If a prima facie case is found, a formal hearing on the complaint is held before three or more members of the Ethics Committee. [1982 Rule 1:20-2(o), now Rule 1:20-3(n). See 457 U.S. at 426.]

11. The lawyer who is charged with unethical conduct may have counsel, discovery is available, and all witnesses are sworn. The panel is required to prepare a written report with its findings of fact and conclusions. The full Committee, following the decision of the panel, has three alternatives. The Committee may dismiss the complaint, prepare a private letter of reprimand, or prepare a presentment to be forwarded to the Disciplinary Review Board. [1982 Rule 1:20-2(l)(m)(n) and (o), now Rule 1:20-3(i)(j)(k)(l) and (b). See 457 U.S. at 427.]

Counsel perm
permitted [Ru
required to "s
findings and
with a record
2.7(b).] Repor
for submissio
Board can aff
miss [Rule 2.7

HSCR 2	HSCR 13
tted [Rule 2.7(b)]. Discovery le 2.12]. Hearing committee ubmit a report containing its recommendations, together of its proceedings." [Rule goes to Disciplinary Board of briefs and oral argument. rm, modify, remand, or dis- c)].	Counsel permitted. Discovery permitted. Special master to "render a decision and an order either dismissing the proceedings or recommending corrective action." Decision and order go to Supreme Court of Hawaii.

NJSCR 1:20

12.	Disciplinary Review Board makes a *de novo* review. Board is required to make formal findings and recommendations to New Jersey Supreme Court. [1982 Rule 1:20-3, now Rule 1:20-4. See 457 U.S. at 427.]	No intermed
13.	All decisions of the Disciplinary Review Board beyond a private reprimand are reviewed by the New Jersey Supreme Court. Briefing and Oral argument are available in the Supreme Court for cases involving disbarment or suspension for more than one year. [1982 Rule 1:20-4, now Rule 1:20-5. See 457 U.S. at 427.]	Review by S ing and oral 2.7(c)].

[28] The District Court in its Order claimed that Plaintiff argue proceedings is constitutionally infirm (R. 19, E.R. 472-473). Plai

HSCR 2	HSCR 13
ate level of review.	No intermediate level of review.
preme Court of Hawaii. Brief- argument are permitted [Rule	Review by Supreme Court of Hawaii. Brief- ing, but no oral argument, is permitted.[26]

that the lack of oral argument before the Supreme Court of Hawaii in the HSCR 13
iff made no such argument!

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON,	)	C.A. No.
Plaintiff-Appellant,	)	87-2325
	)	
vs.	)	D.C. No.
	)	87-0172-ACK
JOSEPH M. GEDAN and HOWARD T. CHANG,	)	Hawaii
	)	
Defendants-Appellees.	)	ON APPEAL FROM
	)	THE UNITED STATES
	)	DISTRICT COURT
	)	FOR THE DISTRICT
	)	OF HAWAII

APPELLEES' ANSWERING BRIEF*

I. ISSUES PRESENTED FOR REVIEW.

1. Whether, under *Younger v. Harris*, 401 U.S. 37 (1971), *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), their progeny, and abstention principles generally, the District Court correctly dismissed this federal attack on pending state disciplinary proceedings designed to prevent ineffective assistance in criminal trials in the courts of the State of Hawaii, and commenced by reason of

(a) a determination by the Supreme Court of Hawaii, in a criminal case on appeal before it, and under

* Covers, tables, addenda, and other material deleted in printing.

the plain error doctrine, that appellant had been constitutionally ineffective in the discharge of his obligations as appointed criminal defense counsel; and

(b) Hawaii Supreme Court Rule 13, which requires investigation of defense counsel by a special master whenever a conviction is vacated for lack of effective assistance, and authorizes, but in no manner requires, coercive action upon such a disposition, and which allows the respondent attorney to advance any reason, including any federal constitutional reason, "showing cause why corrective action as provided herein should not be taken by the Supreme Court."?

2. Whether, assuming *Younger* or other abstention-based dismissal was not required, appellant's claims were jurisdictionally barred by appellant's lack of Article III standing, or by the ripeness doctrine announced in decisions such as *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985)?

3. Whether, independent of the foregoing, appellant's constitutional claims, that the Supreme Court of Hawaii's decision in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985), and commencement of judicial disciplinary proceedings on the basis of the findings therein, deprives appellant of his rights under the First, Fifth, Sixth, or Fourteenth Amendments, are without merit as a matter of law and summary judgment should be entered on appeal in favor of the appellees on the merits?

4. Whether, under the circumstances here, this Court would commit legal error or abuse its discretion in failing to grant appellees attorneys fees and costs on appeal under 28 U.S.C. §§ 1651, 1919, or 1927; 42 U.S.C.

§ 1988; Rule 38, Fed. R. App. P.; Ninth Circuit Rules 17-3 and 28-2.3; or Rule 11, Fed. R. Civ. P.?

II. JURISDICTION.

This action was filed in the United States District Court for the District of Hawaii on March 9, 1987 (Clerk's Record ("C.R.") 1; Appellant's Excerpt of Record ("App. E.R.") 1).

Jurisdiction in the District Court was alleged to have been conferred by 28 U.S.C. § 1343(3) (1982). *Id.* ¶ 1; App. E.R. 2. The District Court's Order Granting Intervenor's Motion to File Amicus Brief and Defendants' Motion to Dismiss, and Denying Plaintiff's Motion for Summary Judgment, *Partington v. Gedan*, No. 87-0172 (D. Haw.) (hereinafter "Slip op.") (C.R. 19; App. E.R. 468), was filed on July 1, 1987, and a Clerk's Rule 58 judgment was filed in the District Court on July 6, 1987 (C.R. 20; App. E.R. 474). A notice of appeal was filed on July 7, 1987 (C.R. 21; App. E.R. 475), and, all claims having been dismissed, this Court has jurisdiction under 28 U.S.C. § 1291.

III. APPELLEES' REQUEST FOR ATTORNEYS FEES ON APPEAL.

Pursuant to Ninth Circuit Rule 28-2.3, appellees request that this Court enter an order affirming the judgment below and granting attorneys fees on appeal. Appellees also respectfully request that upon such an order that the case be remanded to the District Court for computation of such fees under appropriate standards. Appellees advance as authority for such an order 28 U.S.C. §§ 1651, 1919, or 1927; 42 U.S.C. § 1988; Rule 38,

Fed. R. App. P.; Ninth Circuit Rule 30-1.3 and 30-2; and Rule 11, Fed. R. Civ. P. Appellees also brief the issue of fees below.

IV. STATEMENT OF THE CASE.

This case arises out of attorney disciplinary proceedings commenced under Supreme Court of Hawaii Rule 13, which vindicates the State of Hawaii's vital interest in enforcing the Sixth Amendment, state constitutional law, and the Disciplinary Rules and Ethical Considerations of the Code of Professional Responsibility against Earle Partington as a result of the finding, in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985), that Partington, Clarke's appointed criminal defense counsel, failed to render "the effective assistance of counsel at trial." *Id.*

A. The Background of Supreme Court Rule 13 and the Procedural Protections Available to Respondent Counsel in Rule 13 Proceedings.

Like all States, the State of Hawaii has a compelling interest in seeing to it that convictions in our courts comply with the Sixth Amendment's mandate that an "accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This mandate requires that indigent defendants be appointed trial counsel and have their "assistance" not just in form but in fact. As the Supreme Court of the United States has ruled only recently, " 'the right to counsel is the right to the effective assistance of counsel.' " *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *see also Burger v. Kemp*, 107 S. Ct.

3114, 3126 (1987). The State's duty to provide effective assistance flows as well from Article I, § 14 of the Hawaii Constitution, which provides not only that, an "accused shall enjoy the right . . . to have the assistance of counsel for the accused's defense," but states expressly that "[t]he State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment." Haw. Const. art. I, § 14 (1978). The duties of appointed counsel are reinforced by Disciplinary Rules 6-101 and 7-101 of the Rules of Professional Responsibility,[1] which

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[1] Hawaii Disciplinary Rule 6-101 provides in its entirety:

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

Hawaii Disciplinary Rule 7-101 provides in its entirety:

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B).

(Continued on following page)

in Hawaii are codified by reference in Supreme Court Rule 2.2(a) and (b) (1984), which provide in turn that "[a]cts or omissions by an attorney which violate the Code of Professional Responsibility shall constitute misconduct and shall be ground for discipline." Because of the overriding public interest in ensuring that criminal defendants have the benefit of effective assistance, in obtaining convictions that can withstand scrutiny on

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(Continued from previous page)

A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(b).

(A) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

appeal and collateral review, and in avoiding by effective means the chance that defense counsel will "throw" a criminal trial to obtain a reversal on appeal or on collateral review, we have also taken special steps to enforce the unique duties and status of criminal defense counsel. *See Polk County v. Dodson*, 454 U.S. 312, 321-22, 323-24 (1982). These are reflected in Supreme Court of Hawaii Rule 13.

1. How Supreme Court of Hawaii Rule 13 Works.

Supreme Court of Hawaii Rule 13,[2] reprinted in addendum "A," provides that specific notice must be given to the Supreme Court of Hawaii by the filing of a certificate "[w]henever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final[.]" *Id.* ¶ 1.[3] Within five days of

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[2] Rule 13 draws for its authority upon Haw. Rev. Stat. § 602-11 (1985), which provides that "[t]he supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law."

[3] Under Hawaii's judicial system, all appeals initially are filed in the Supreme Court of Hawaii and then are referred by the administrative justice either to the Supreme Court or to the Intermediate Court of Appeals in accordance with the criteria set forth in Rule 31, Haw. R. App. P. *See* Haw. Rev. Stat. § 602-5(8) (1985). If a conviction is reversed by the Intermediate Court of Appeals and certiorari is not sought from the Supreme Court of Hawaii, there would be no way, apart from the certificate, for the Court to know of such a reversal.

filing the certificate, the Chief Justice is required to appoint a special master "to determine whether action against the counsel alleged to have been incompetent is warranted." *Id.* ¶ 2. The master, within five days of appointment, gives notice to the respondent attorney, who then has forty-five days in which to "file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court." The law expressly permits the respondent attorney to move to disqualify the master for bias or prejudice at the time of answer. *Id.* ¶ 5. Within five days after the answer is filed, the master appoints "an attorney to further prosecute the proceedings and [gives] notice of the appointment to the respondent attorney." *Id.* ¶ 6. Thereafter, the parties are allowed a minimum of forty-five days to conduct discovery, with full process available in accordance with the Hawaii Rules of Civil Procedure, which in most respects are identical to the Federal civil rules. *Id.* ¶ 7. After the discovery period is closed, the matter is set for evidentiary hearing before the master within thirty days. *Id.* The master's decision and order may dismiss the proceedings or recommend to the Supreme Court of Hawaii that it take corrective action, including prescribing courses of remedial education, or suspending the respondent's license to practice law. *Id.* ¶ 8. If the master finds ineffective assistance, and finds that such ineffectiveness "may have resulted from a violation of DR 6-101 or DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel." *Id.* At all times in the proceedings before the master, the respondent may represent himself or may appoint an attorney to do so. *Id.* ¶ 8. Interlocutory

review of any claims that arise in the course of the Rule 13 proceedings can also be had by reason of the traditional prerogative writs of prohibition, mandamus, and certiorari available under Haw. Rev. Stat. §§ 602-5(6) and (7) (1985).

The final word on any "corrective action" lies with the Supreme Court of Hawaii. If the master's decision is adverse, under ¶ 10 of the Rule the respondent lawyer, or his attorney, may within twenty days from the rendering of the master's decision file exceptions in the Supreme Court of Hawaii and a supporting memorandum. The Supreme Court is then required, within forty days of the master's report, to render an order dismissing the proceedings or ordering corrective action. As is the master, the full Court may refuse to take action for *any* reason offered or appearing in the record. The "guidelines set forth" at Rule 13 ¶ 9 are fully permissive and allow the respondent to advance any reason why coercive action should not be taken against him.

Nothing in the Rule could even be remotely construed as precluding, for example, a respondent attorney from arguing that the finding of ineffectiveness in the underlying criminal case was erroneous. Nothing in Hawaii's law of claim or issue preclusion would permit the prosecutor in a Rule 13 proceeding to argue that the respondent attorney, who for purposes of Rule 13 could not possibly be in privity with his former client on the issue of ineffectiveness, was bound by the judgment in the criminal case. *See Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965 (1982) (per curiam) (quoting *Ellis v. Crockett*, 51 Haw. 45, 55-56, 451 P.2d 814, 822 (1969) (citing *Yuen v. London Guarantee and Accident Co.*, 40 Haw. 213, 223

(1953)) (on the privity requirement for claim preclusion), and *Morneau v. Stark Enterprises, Ltd.*, 56 Haw. 420, 424, 539 P.2d 472, 476 (1975) (permitting collateral estoppel to be used only in situations where party had full and fair opportunity to defend actions). Indeed, the Rule's express language permits the full range of issues to be considered. To recommend reference to Disciplinary Counsel, the master, for example, must take testimony and expressly "find[ ] that ineffective assistance of counsel" has occurred. Indeed, the respondent attorney is expressly permitted to advance *any* reason "showing cause why corrective action as provided herein should not be taken by the supreme court," including any claim that imposition of sanctions would violate the respondent lawyer's constitutional rights. This reading of the rule dovetails with the Supreme Court of Hawaii's scrupulous commitment to judicial review of administrative action for conformity to constitutional requirements, demonstrated only recently by the decision in *HOH Corp. v. Motor Vehicle Licensing Board*, 736 P.2d 1271 (Haw. 1987), which permits constitutional challenges to agency action, including challenges to the underlying statutes that support agency action, to be raised on direct appeal under the Hawaii Administrative Procedure Act. *See* 736 P.2d at 1276.

Finally, taken in conjunction with provisions of the disciplinary rules, codified at Haw. S. Ct. R. 2.2(a) (1984), the respondent lawyer is under no obligation to respect the confidences of his former client. Under DR 4-101(C), in Hawaii, as in other jurisdictions which adopt the Model Rules, "[a] lawyer may reveal . . . [c]onfidences or

secrets necessary . . . to defend himself against an accusation of wrongful conduct." Nothing in Hawaii law prevents the lawyer from using this rule in a Rule 13 case.

2. Why the Rule Exists.

Nothing could be more fundamental to the functioning of the criminal justice system in Hawaii than the interests that are served closely and compellingly by the provisions of Rule 13 of the Supreme Court of Hawaii. One clear and obvious purpose is to protect criminal defendants who are in fact innocent, but whose defenses are not believed because of their counsel's ineffectiveness. In this critical sense, the Rule reflects the Supreme Court of Hawaii's overriding commitment "to enforce the supreme law of the land," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985). Second, as noted in *State v. Smith*, 712 P.2d 496, 502 (Haw. 1986), "Rule 13 of the rules of this court stands as a disincentive for competent attorneys" to turn criminal trials " 'into reversible trials by simply eliciting constitutionally impermissible [testimony [or other by commiting other errors and omissions.]]' " Prosecutors, who must face the public's wrath at trials that are lost through presentations that are so weak that they result in acquittal, or so forceful that they result in reversal, *see United States v. Young*, 470 U.S. 1, 7 (1985), are simply not faced with the same incentives and lack of checks as defense counsel who engage in courtroom impropriety that ultimately produces a "loss" for the client. For a criminal defendant who faces evidence of guilt that is substantial, but not so overwhelming to make ineffective assistance harmless, *see Strickland v. Washington*, 466 U.S. 668, 691 (1984); *but see Smith, supra*, 712 P.2d

at 500 n.7 (noting that under the Hawaii constitution ineffective assistance may be deemed to be prejudicial error whether or not it is prejudicial in fact), absent swift enforcement mechanisms against distortion of the judicial process, "deliberate indifference" by criminal defense counsel effectively, but quite impermissibly, assists the "defence." As the Court stated in *Nix v. Whiteside*, 106 S. Ct. 988 (1986), "[a]lthough counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 994. Supreme Court of Hawaii Rule 13 recognizes that "the law" includes even a defendant's own rights to effective assistance.

B. The Proceedings in State v. Clarke and the Pending Rule 13 Proceedings Against Partington.

On December 27, 1985, the Supreme Court of Hawaii triggered the provisions of Supreme Court of Hawaii Rule 13 by finding that Earle Partington, a Honolulu attorney, had been constitutionally ineffective in acting as appointed criminal defense counsel for Clifford M.M. Clarke, who had been indicted by the Oahu grand jury on charges of murdering his live-in girl-friend's infant daughter. *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (C.R. 1, App. E.R. 165-66). Employing the presumptively harmful error standard from *State v. Antone*, 62 Haw. 346, 615 P.2d 101 (1980), and exercising a state court's "primary responsibility to interpret and apply [its] plain-error rules," *Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982), the Court found that Partington's "assistance" was constitutionally ineffective because Partington (1) refused to

make an opening statement; (2) refused to cross-examine the victim's mother, the prosecution's principal percipient witness (on the ground that records that would have been necessary to cross-examination were not available); (3) refused to call the mother as a hostile witness for Clarke when the records became available; (4) elicited testimony from two prosecution witnesses supporting their belief that Clarke was guilty; and (5) did not make a closing argument. *Id.* Stating that "none of the five alleged tactical decisions which we have enumerated above (let alone all five considered together) was within the range of competency demanded of attorneys in criminal cases," the court vacated the conviction and remanded for a new trial. *Id.*[4] Although Partington, as appellate counsel, had not included his own ineffectiveness as trial counsel in his nine main allegations of error, *see* Appellant's Opening Brief, No. 10041 (Haw. Apr. 29, 1985) (C.R. 1, App. E.R. 9-53), Partington had informed the state supreme court, prior to argument, in a November 9, 1984, motion for remand, of charges made by trial judge Leland Spencer to the Office of Disciplinary Counsel that "by failing to give a final argument to the jury on behalf of his client and by stating in the presence of the jury that it would be a 'waste of time', Mr. Partington intentionally attempted to make reversible error, i.e., to prejudice his own client's case for the purpose of forcing an appellate court to reverse what Mr. Partington anticipated would be a conviction." (C.R. 1; App. E.R. at 150). Judgment was entered

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[4] Clarke was convicted of murder on remand. Aff. of Christopher Evans ¶ 1, No. 87-172 (D. Haw. Apr. 22, 1987) (C.R. 6).

January 20, 1986 (C.R. 1; App. E.R. at 168), Rule 13 certificates were filed on January 27, 1986, Special Master, and appellee here Joseph A. Gedan, was appointed on February 3, 1986 (C.R. 1; App. E.R. at 174), and Partington was notified of the commencement of Rule 13 proceedings on February 7, 1986 (C.R. 1; App. E.R. 176-77). Partington answered on March 27, 1986 (C.R. 1; App. E.R. 178-86), and Special Master Gedan appointed Howard T. Chang, attorney, and co-appellee here, as the Rule 13 prosecutor on August 13, 1986 (C.R. 1; App. E.R. 188).

While the Rule 13 proceeding remained fully pending, and Partington's rights to defend himself under state law were vital and alive, Partington filed the instant action in the United States District Court for the District of Hawaii, conclusorily (and in fact falsely), alleging that because of the decision in *State v. Clarke, supra*, Partington "has been found guilty of serious misconduct, having been denied a hearing and without any opportunity to defend himself." Complaint for Damages and Declarative and Injunctive Relief ¶ 18 (C.R. 1: App. E.R. at 6). Partington alleged that Special Master Gedan and Prosecutor Chang had denied Partington his First Amendment "right to freedom of speech," his Fifth Amendment "right to due process of law," his Sixth Amendment "right of unhindered representation of those accused of crime," and the Fourteenth Amendment "right to the equal protection of the law." *Id.* ¶ 22. On March 30, 1987, Defendants Gedan and Chang, sued both for damages and equitable relief, moved to dismiss (C.R. 5), relying on the *Younger* doctrine, *Younger v. Harris*, 401 U.S. 37 (1970), the *Pullman* abstention doctrine, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the ripeness doctrine, and the

principles of officer's immunity. On April 22, 1987, Partington cross-moved for summary judgment, (C.R. 6). Before the District Court even heard argument, the state court proceedings were fully pending, the Rule 13 hearings having on March 18, 1987, been scheduled by the Special Master for April 14, 1987, Ex. C to Motion to Dismiss Complaint (C.R. 5), but stayed at Partington's request. Aff. of Earle Partington dated Apr. 21, 1987, ¶ 15 (C.R. 6). Having made no motion under the Hawaii Rule of Appellate Procedure, and having sought no writ of mandamus or prohibition, ordering dismissal of the state proceedings for lack of prosecution, Partington asserted the pendency of the Rule 13 proceedings had chilled his free speech rights, denied him protected property interests in his calling without due process of law, denied him a Sixth Amendment right "to practice his profession without hindrence," and violated the Equal Protection Clause because the prosecutors in *Clarke* were not subject to Rule 13, and another attorney, who had been found ineffective in a federal habeas proceeding under 28 U.S.C. § 2254, had not been subject to the Rule 13 process. *See* Mem. in Support of Plaintiff's Motion for Summary Judgment at 3-15 (C.R. 6). Having conceded that his damages claims failed in light of the doctrine of absolute immunity, *see id.* at 31 (citing *Pierson v. Ray*, 386 U.S. 547 (1967)), Partington nevertheless asserted that, despite the protections afforded by Rule 13, the Special Master had "no power" to vindicate Partington's constitutional claims, "the Supreme Court of Hawaii is hardly about to admit that it erred in finding [Partington guilty of misconduct," and "[t]here is no chance of Plaintiff receiving due process

through the court's action on the Special Master's recommendation." *Id.* at 13, 22 (C.R. 6).

Meanwhile, Partington and other members of the defense bar had asked the Supreme Court of Hawaii to amend Rule 13, and, on April 27, 1987, the Supreme Court of Hawaii responded in writing through our Chief Justice to claims that Rule 13 did not provide respondent attorneys a chance to raise all relevant defenses. Noting that Rule 13 was designed to prevent both sandbagging by defense counsel who would be deliberately ineffective in cases where the State would be entitled to a conviction, and needless delays for criminal defendants who might have prevailed at trial, the Chief Justice explained the protections given by Rule 13:

> In the large majority of cases where ineffective assistance of counsel is claimed, the issue comes up either on an appeal from the criminal conviction or in a post-conviction proceeding under HRPP 40, and the particular counsel, who is alleged to have been ineffective, is usually no longer in the case. At any rate, the claim of ineffective assistance of counsel must be judged by the court hearing the HRPP 40 proceeding, or by the appellate court, on the record before it. We therefore deemed it appropriate to provide by HSCR 13 a procedure where the attorney in question had an opportunity to contest, on his own behalf, the charge of ineffective assistance of counsel, before an impartial master, *who is in no way bound by the previous determination in the criminal case or in the HRPP 40 proceeding*. HSCR 13 moreover provides for the master's determination to be reviewed by the Supreme Court with an opportunity for the parties to file exceptions to the master's determination.

Letter from Chief Justice Herman Lum dated Apr. 27, 1987, Ex. "A" to Aff. of Susan L. Gochros dated May 21, 1987 (C.R. 10). By a separate letter, submitted by Partington, the Chief Justice responded to Partington's equal protection attack on failures to initiate Rule 13 proceedings in cases where state convictions had been overturned on federal habeas, noting in none of the cases of federally-determined ineffectiveness had the attorneys filed Rule 13 certificates, and, in any event, "it is questionable whether we are in a position to order counsel in those proceedings to file such a certificate." Letter from Chief Justice Herman Lum to Earle Partington, Esq., dated Apr. 27, 1987, Ex. "B" to Affidavit of Earle Partington dated May 28, 1987 (C.R. 14).

The District Court, after argument on June 8, 1987, rejected Partington's claims (C.R. 19). Relying on Partington's concession on immunity, the court denied damages relief, and dismissed remaining claims under *Younger*, Slip op. 2-6 (C.R. 19). Following the direct holdings of *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court applied the now-familiar three-part test applicable in *Younger* cases, concluding, as in *Middlesex*, that the Rule 13 proceeding was an ongoing judicial proceeding implicating important and vital state interests. Slip op. at 3. Finding that "[t]he only disputed issue is whether Partington will be accorded an adequate opportunity to raise his constitutional issues before a state tribunal," *id.*, the Court found that Rule 13 formally provided the required hearings, and that Partington had failed "to create even an inference of prejudice." *Id.* at 4. Citing *Withrow v. Larkin*, 421 U.S. 43 (1974), the court found that due process was satisfied

notwithstanding the fact that the Rule 13 investigation was triggered by a ruling entered by the Supreme Court of Hawaii. *Id.* at 5. The court further found, based on procedures that are a commonplace of appellate practice, that the Supreme Court of Hawaii's authority to deny oral argument in Rule 13 proceedings was not a violation of due process or restriction sufficient to warrant the failure to dismiss under *Younger* precepts. *Id.* 5-6. After filing the District Court's decision on July 1, 1987, the Clerk entered a Rule 58 judgment on July 6 (C.R. 20).

This appeal followed.

V. SUMMARY OF ARGUMENT

This appeal is without merit under any plausible view of the record. Conceding, as he did below, that the District Court was correct to dismiss all claims for damages relief, Partington also accepts, as he did below, that the pending-state-proceedings and important-state-interests predicates for *Younger* abstention are fully present on this record. Any suggestion to the contrary would be flatly contrary to established immunity principles, the binding decision in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), and a host of other decisions interpreting and expanding *Younger, e.g. Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). The only question this Court need answer is whether, in the words of *Middlesex*, Partington has "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432. The record shows the answer to this question is patently in the affirmative. Rule 13 is

clear on its face that all reasons may be claimed "why corrective action as provided herein should not be taken by the supreme court," and respondent attorneys are only "alleged" not presumed, "to have been incompetent." If the entire structure of the Rule, appellate remedies, and Hawaii caselaw were not enough under *Younger*, the Chief Justice's April 27, 1987, letter proves beyond peradventure that Partington "has had abundant opportunity to present his constitutional challenges in the state disciplinary proceedings." 457 U.S. at 436. Reversal of Judge Kay's dismissal would require blatant disobedience of not justice *Middlesex*, but clearly established precepts laid down by the Supreme Court only last Term, including the fundamental rule that "when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of *unambiguous* authority to the contrary." *Pennzoil*, 107 S. Ct. at 1528 (emphasis added). *Younger* fully applied here.

Moreover, appellant's constitutional claims are wholly without merit. *First*, Partington lacks standing to assert any Sixth Amendment interest implicated by overenforcement of state law effective assistance rules in *State v. Clarke*, for the Sixth Amendment, on its face, grants rights only to an "accused." Whatever Partington is in *this* case, he was not an "accused" in Clarke. *Second*, assuming *Younger* does not require dismissal, appellant's due process claims fail under the adequate state remedy doctrines, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Hudson v. Palmer*, 468 U.S. 517 (1984); and *Parratt v. Taylor*, 451 U.S. 527 (1981), and are meritless because Partington has no property

interest that has been infringed, *Paul v. Davis*, 424 U.S. 693 (1976), and because he has received all the "process due," *e.g.*, *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985). *Third*, Partington's First Amendment claims to be able to engage in a particular style of in-court advocacy are novel and frivolous under *Nix v. Whiteside*, 106 S. Ct. 988 (1986), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *Fourth*, Partington's Equal Protection claims that Rule 13 is improperly discriminatory on its face are frivolous, as is Partington's as-applied challenge.

The most serious question on appeal therefore is whether this Court should award sanctions on appeal. Because appellant's positions are objectively frivolous, this Court should grant attorneys fees and costs on appeal under 28 U.S.C. 1927 and 42 U.S.C. § 1988, as well as Fed. R. App. p. 38 and Fed. R. Civ. P. 11. If the Court affirms that the District Court correctly dismissed under *Younger*, the Court should also consider granting attorneys fees under the "just costs" standard of 28 U.S.C 1919.

VI. ARGUMENT.

A. The District Court Correctly Dismissed Appellants' Claims for Equitable Relief Under the Principles of Comity, Equity, and Restraint Reflected in the Younger Doctrine.

The District Court's decision to decline to exercise federal jurisdiction "[o]n the basis of comity and federalism," Slip op. at 2, presents a question of law that is subject to *de novo* review. *See Kitchens v. Bowen*, 825 F.2d

1337, 1339 (9th Cir. 1987) (citing *Fresh Int'l Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir. 1986)). Under *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), a federal court must dismiss federal proceedings to restrain (1) an "ongoing judicial proceeding" (2) "implicate[ing] important state interests" and in which (3) "there is an adequate opportunity in the state proceedings to raise constitutional challenges." *Id.* at 432. *Younger* abstention requires "outright dismissal," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), and applies to claims for injunctive relief, *Younger*, 401 U.S. at 45, or declaratory relief, *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).[5] *Younger* also applies to pending "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio*

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[5] *Younger* also prohibits damages relief. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 518-19 (1982) (White, J., concurring in part); *Caldwell v. Camp*, 594 F.2d 705, 708 (8th Cir. 1979); *Meadows v. Evans*, 529 F.2d 385, 386 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 345, *cert. denied*, 434 U.S. 969 (1977); *Martin v. Merola*, 532 F.2d 191, 194-95 (2d Cir. 1976); *Guerro v. Mulhearn*, 498 F.2d 1249, 1251-55 (1st Cir. 1974). Since appellant waived claims below for damages, *see* Slip op. at 2 (C.R. 19), and has reiterated that waiver here, *see* Appellant's Opening Brief at 6 & n.6, this Court should not consider any claim that *Younger* dismissal was improper because Partington sought damages, insofar an abandonment below, even if raised on appeal, will be forgiven only to prevent manifest injustice. *Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir. 1984). State waivers of the protection of the *Younger* doctrine must be knowing and explicit, however, *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir. 1987), but no issue of waiver is presented here.

Civil Rights Comm'n v. Dayton Christian Schools, 106 S. Ct. 2718, 2723 (1986). And contrary to Appellant's suggestion, Appellant's Opening Brief at 26, the District Court has no discretion to ignore the mandates of *Middlesex* whenever the Court believes "exceptional circumstances" and the "clearest of justifications" are not present. *Id.* (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14 (1983) (citation omitted)). When the *Middlesex* test is met, the State has established the "exceptional circumstances" and the "clearest of justifications" that the law requires. Under *Middlesex* and its progeny, Judge Kay's ruling that the bases for *Younger* dismissal were present was totally correct and the judgment should be affirmed on this basis.

1. Partington Has Conceded Throughout, and the Record is Plain, that the Pending-Judicial-Proceedings and Important-State-Interests Predicates for Younger Dismissal are Present.

As the District Court noted below, Partington did not take issue with the conclusion that "[t]he present action [implicates] an ongoing disciplinary hearing which is judicial in nature and which implicates an important state interest in assuring the professional conduct of its attorneys." Slip op. at 3. Nothing in Appellant's brief seriously contests the lower court's correct findings under the first two *Younger* prongs,[6] and nothing in the record could possibly cause reversal on these grounds.

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[6] Appellant states that "[t]he questions which must be asked in this case are (1) *did* Plaintiff have an adequate

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First, there can be no doubt that the Rule 13 proceedings were fully pending when this action commenced on March 9, 1987. The Rule 13 certificates were filed on January 27, 1986, Special Master Gedan was appointed on February 3, 1986, Partington was notified of the Rule 13 proceedings on February 7, 1986, and filed his answer on March 27, 1986. Prosecutor Chang was appointed on August 13, 1986. Even if the Court were to view the notice of evidentiary hearings, filed on March 18, 1987, as the critical date, when in fact for *Younger* purposes the Rule 13 proceedings had started long before, this, too, would suffice under the pending-state-proceedings prong. "No [federal] proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles." *Middlesex, supra*, 457 U.S. at 437; *accord, Hawaii, Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984) (same). *See also Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1529 n.16 (1987) (allowing assertion of newly available state remedies even when lower federal courts entertained case on the merits). There is also no doubt that the pending disciplinary proceedings are and were judicial in nature. Under Rule 13, the respondent attorney is entitled to a neutral

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opportunity to raise [his constitutional] issues before the 'Final Adjudication' of misconduct by the Supreme Court of Hawaii, and (2) if he did not have such an opportunity, *can* he ever have an adequate opportunity to raise these issues in the HSCR 13 proceeding?" Appellant's Opening Brief at 28. While we would not characterize the issue precisely in this manner, we accept the concession in this assertion that the first two *Younger* prongs are present.

factfinder, and is entitled to take discovery and present evidence in conformity with the Hawaii Rules of Evidence and of Civil Procedure, as well as to argue both orally and through briefs, to the Special Master, and to file written exceptions, and briefs, on appeal. In every sense the Special Master performs the same function as the local District Ethics Committees in *Middlesex*: to "act as the arm of the court in performing the function of receiving and investigating complaints and holding hearings." 457 U.S. at 433.

Second, it is equally undisputed that the Rule 13 proceedings implicate the most vital state interests. This second *Younger* prong is clearly present under *Middlesex*, which holds that "[t]he judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Id.* at 434. Indeed, *Younger* concerns are at their zenith here, since "[t]he State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance." *Id.* As our own Supreme Court of Hawaii has said, "[I]t is the solemn duty of [the Supreme Court of Hawaii] to regulate the practice of law in this state and to see that the integrity of the profession is maintained by disciplining attorneys who indulge in practices inconsistent with the high ethical standards demanded of all members of the bar." *Disciplinary Board of Hawaii Supreme Court v. Bergan*, 60 Haw. 546, 553, 592 P.2d 814 (1979). Thus, the important-state-interests criterion was clearly met. *See also Pennzoil*, 107 S. Ct. at 1527 & n.12 (important-state-interests prong vindicates "the State's interest in protecting

'the authority of the judicial system' " and "processes by which the State compels compliance with the judgments of its courts").

2. Appellants' Arguments that the Adequate-Opportunity-to-Litigate Predicate is Lacking Misread Every Source of Law that Serves to Protect Respondent Attorneys Under Rule 13.

Conceding that the only issue on appeal is whether, under *Middlesex* there is "an adequate opportunity in the state proceedings to raise constitutional challenges," *see* Appellant's Brief at 27-28, Partington engages in the same erroneous analysis that has led to numerous reversals by the Supreme Court of the United States. The basic lesson of these decisions is that "when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should asume [sic] that state procedures will afford an adequate remedy, in the absence of *unambiguous* authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1528 (1987) (emphasis added). As this Court has held only recently, for "those who failed to raise their constitutional claims in state court, the relevant question is whether they *'could have* presented' those claims to the state court." *Kitchens v. Bowen*, 825 F.2d 1337, 1342 (9th Cir. 1987) (quoting *Fresh Int'l Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir. 1986) (emphasis in original). Partington's claim that the Rule 13 proceedings do not meet this standard simply ignores a rash of state procedural law, including the plain language of Rule 13 itself, that grants "abundant opportunity to present" "constitutional

challenges in the state disciplinary proceedings." *Middlesex*, 457 U.S. at 436. Thus, Partington claims, Appellants' Opening Brief at 28-35, that (a) that the adjudication in *State v. Clarke* finally concluded all relevant proceedings in the Rule 13 action before the Special Master; (b) relatedly, that the Supreme Court of Hawaii is necessarily biased by its ruling in *State v. Clarke* and could not give a fair treatment of any appeal; (c) that he cannot obtain due process in the Rule 13 case because he is forbidden by the attorney-client privilege from testifying about his tactical bases for not acting in *Clarke*; that (d) somehow, independently, his claimed federal rights are such that it breached due process not to have a separate hearing, prior to the Supreme Court of Hawaii's reversal in *Clarke*, on the effective assistance issue. All of the foregoing assertions are totally wrong, either in their premises or in their conclusions, and simply demonstrate more than ever why the District Court rightly dismissed the case.

a. The Contention that the Special Master is Bound to Find Ineffective Assistance of Counsel is Frivolous.

Asserting "that the Special Master is powerless to remedy the harm already done" Appellant's Brief at 29, Partington harps on a theme that he has been "adjudged incompetent or guilty of misconduct," *id.* at 24, and then seeks to bootstrap this bare assertion into a conclusion that *Younger* dismissal was inappropriate because he cannot get a fair heaing [sic] before the Special Master.

As the discussion of Rule 13, *supra*, shows, this is demonstrably wrong. Rule 13 is clear that a respondent attorney may rely on *any* reason "showing cause why

corrective action as provided herein should not be taken by the supreme court." One of most obvious reasons that respondent attorneys can assert in Rule 13 proceedings as to "why corrective action . . . should not be taken" is that "the counsel alleged to have been incompetent," Rule 13, was not incompetent in fact. The discovery process set up by Rule 13 gives force to this basic right of respondent attorneys to prove their innocence, and the prerogative of the Special Master to enter "an order dismissing the proceedings" is totally at odds with Partington's perverse notion that he has been tried and convicted before the *Special Master* has acted. To give credence to Partington's claims, the Court would be required in major fashion simply to write whole portions of Rule 13 out of existence. Not only would this grossly violate ameliorative state law doctrines, *see Camara v. Agsulud*, 67 Haw. 212, 215, 685 P.2d 794, 797 (1984), and the Supreme Court of Hawaii's own interpretation of the Rule, to which this Court must give "rigid deference," *see Posadas de Puerto Rico Associates v. Tourism Co.*, 106 S. Ct. 2968, 2976 n.6 (1986), under *Pennzoil* this is exactly what federal courts are *not* supposed to do when litigants assert state rules are inhospitable to federal claims.

Nor does Partington's repetitious invocation of the title of Rule 13 – "Proceedings Following Final Adjudication of Ineffective Assistance of Counsel in Criminal Cases" – lend any support to appellant's claim, Appellant's Opening Brief at 32 n.18 (quoting *Spears v. Honda*, 51 Haw. 1, 17, 449 P.2d 130, 139 (1968)), that the Special Master does not have the full range of legal options in front of him. The "final adjudication" to which the Rule refers is simply an adjudication of ineffective assistance

that in fact is so serious that it is not appealed, or, if it is appealed, is sustained on appeal. Certainly the Supreme Court of Hawaii might have written its rule to require any finding of incompetence by any court sufficient to warrant a Rule 13 proceeding, but the court recognized that lower courts (including even the Supreme court of Hawaii in cases in which federal standards are followed) are often "ineffective" in their own right, and that a criminal defense counsel whose conduct is ultimately found to be constitutionally effective is not such a serious risk to the judicial system that special disciplinary proceedings are needed. That is all the word "final" is about. In harping on the word "final" in the Rule, appellant just "tilt[s] at windmills." *Quern v. Jordan*, 440 U.S. 332, 338 (1979). Under Hawaii law the Supreme Court of Hawaii independently considers all of the testimony and evidence in Rule 2 disciplinary proceedings, and there is no reason to think, especially absent any unambiguous case-law to the contrary, that the court would do any different in a Rule 13 case. *Disciplinary Board of Hawaii Supreme Court v. Bergan*, 60 Haw. 546, 554, 555, 592 P.2d 814 (1979). Review, both as to fact, and law, is *de novo* in the Supreme Court of Hawaii. *Disciplinary Board v. Kim*, 59 Haw. 449, 451, 583 P.2d 333 (1978); *accord, Office of Disciplinary Counsel v. Kagawa*, 63 Haw. 150, 155, 622 P.2d 115 (1983). This makes any claim about preclusion of issues before the magistrate doubly specious, insofar as under *Younger* litigants cannot invoke the federal court's jurisdiction even when they must wait for an appeal from an agency ruling to obtain an adjudication of their constitutional claims. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718, 2724 (1986).

b. The Contention that the Supreme Court of Hawaii is Unconstitutionally Biased in Favor of a Finding of Ineffective Assistance is also Frivolous.

Citing *Gibson v. Berryhill*, 411 U.S. 564 (1973), Partington moves on in his litany of due process allegations by urging that "a finding of 'not guilty' in the HSCR 13 proceedings (assuming such a finding is even permitted) would be totally incompatible with the 'final adjudication' reversing Clarke's conviction," Appellant's Opening Brief at 32, and, for that reason, any proceedings in the Supreme Court of Hawaii will be a sham. *Id.*

Nothing supports this untoward view except the impermissible and "denigrat[ing]" suggestion that "judges who serve on the state courts . . . will not enforce the supreme law of the land." *Atascadero State Hospital v. Scanlon*, 473 U.S. at 240 n.2 (1985). As the Supreme Court of the United States held in *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986), a due process defect in state court proceedings based on bias or prejudice alone cannot be inferred except "only in the most extreme cases." *Id.* at 1585. Even a judge's "general frustration" with a litigant, based on nothing in the case before him, is not enough. *Id.* And here, there is no suggestion that the Supreme Court of Hawaii has this sort of "extrajudicial" bias against Mr. Partington.

In this regard, Judge Kay's ruling that this case was indentical to *Withrow v. Larkin*, 421 U.S. 43 (1975), effectively answered any claim that "the extensive publicity arising out of *State v. Clarke*" rendered "the Supreme Court of Hawaii . . . hopelessly 'wedded' to its findings against Plaintiff." Appellant's Brief at 33. *Withrow*, to be

sure, states that "if the intial [sic] view of the facts based on the evidence derived from nonadversarial process as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Id.* at 58. But there is nothing in the record that would indicate Partington has shown this test has been met. Certainly, as a legal matter there is nothing in Hawaii law that requires the Supreme Court of Hawaii to give collateral estoppel effect to the ineffective assistance finding in *Clarke*; indeed, as our review of Hawaii preclusion doctrines, *supra*, show, the law is all to the contrary. Nor is there any practical limitation on the Supreme Court of Hawaii's review in a Rule 13 case. As in *Withrow*, its ultimate position would "most probably merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing." *Id.* at 57-58. Partington's position, if accepted, would run counter to all of the recent jurisprudence admonishing the lower federal courts that denying state courts the opportunity "to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity." *Smith v. Murray*, 106 S. Ct. 2661, 2666 (1986).

Moreover, even if the Supreme Court of Hawaii, as constituted in December 1985, would be constitutionally biased against Partington, there is nothing that would prevent Partington from filing appropriate motions for recusal under Haw. R. App. P. 27 or under the all-writs authority, Haw. Rev. Stat. §§ 602-5(6) and (7) (1985). As the Supreme Court held in *Kugler v. Helfant*, 421 U.S. 117 (1975), decided less than two weeks after *Withrow*, this Court simply could not conclude, even if the five justices

in *Clarke* are biased against Partington, which they are not, "that the objectivity of the entire [Hawaii] court system has been irretrievably impaired so far as [Partington] is concerned." *Id.* at 127. Hawaii has three very independent members of the Intermediate Court of Appeals, at least two retired Supreme Court Justices, and more than a dozen Circuit Court judges who are eligible to sit by on the Supreme Court of Hawaii when recusal of one or more of the justices is required. *See* Haw. Rev. Stat. § 602-10 (1985). And Canon 3(C)(1)(a) of the Code of Judicial Conduct of Hawaii, which is incorporated by reference at S. Ct. R. 8.5(a)(5), mandates that a judge recuse himself, *sua sponte*, whenever "he has a personal bias or prejudice concerning a party." Thus, as in *Kugler*, "[e]ven if concern for the *appearance* of complete impartiality could in some case conceivably justify . . . disruption of state [attorney disciplinary] proceedings, this is not such a case," for Hawaii "has preserved the appearance of judicial objectivity." 421 U.S. at 130-31.

c. The Contention that the Rule 13 Proceedings Are Unconstitutionally Tainted by the Attorney Client Privilege is also Frivolous.

Partington's third problem with the Rule 13 process is that he cannot meet the burden imposed by Rule 13 because "Clarke no longer ha[s] any interest in testifying and he has invoked the attorney/client privilege," and, accordingly, "the attorney/client privilege prevents him from explaining his actions." Appellant's Brief at 29 n.17. This argument, too, "places form over substance, and labels over reality." *Bowen v. Gilliard*, 107 S. Ct. 3008, 3019

(1987). The attorney client privilege in Hawaii, as elsewhere, can be breached when a lawyer needs to reveal "[c]onfidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct." DR 4-101(C)(4). A charge of ineffective assistance is certainly an instance where this rule comes into play. Ultimately, Partington has no due process right to the evidence presumptively covered by the attorney client privilege, *see Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1390 (9th Cir. 1986). But in light of the circuit-breaking effect of DR 4-101(C)(4), there is no claim he is barred from that proof.

d. The Contention that the Rule 13 Proceedings Are Unconstitutionally Tainted by the Alleged Immediate Impact on Plaintiff's Reputation is also Frivolous and Would Require this Court to Violate Article III.

Partington's final contention why *Younger* abstention was inappropriately ordered by the court below is the literally astounding suggestion that, wholly apart from the above, the claimed immediate impact of the entry of *State v. Clarke* on the Supreme Court of Hawaii's docket generated such overwhelming harm that no remedy short of nullifying the entire Rule 13 process that follows under Hawaii law would comport with the requirements of procedural due process. Thus, according to Partington, "HSCR is a postdeprivation remedy in a situation in which due process requires a predeprivation remedy." Appellant's Opening Brief 29.

The main problem with this claim is that it has *nothing* to do with Rule 13, and enjoining the Rule 13 proceeding as unconstitutional, either on its face, or as applied,

would not redress Partington's injuries. Rather, these "harms" flow from the fact that, in *State v. Clarke*, and in criminal appeals generally, lawyers who are accused of being constitutionally ineffective at trial do not have any right to participate in the briefing or at oral argument. Clearly, in *every* case where a lawyer is found to have rendered constitutionally ineffective assistance, and the Court's decision is published in the community, that lawyer is going to look somewhat incompetent and suffer some injury to his reputation, whether in fact the lawyer was incompetent or not. The evil of which Partington complains has nothing to do with whether the State then initiates potentially coercive disciplinary proceedings, but rather implicates whether the appellate Courts are going to hear ineffective assistance claims at all, or, if they do, are constitutionally required to permit the counsel who is the subject of scrutiny to intervene and file briefs and make arguments to buttress his professional reputation.

Partington's attempt to evade *Younger* dismissal "because the harm was complete shortly after the filing fo [sic] the decision of the Supreme Court of Hawaii in *State v. Clarke*," Appellant's Brief at 29, is flawed on several grounds. *First*, under Article III of the Constitution, this Court, and the District Court, are bound to observe the rule that equitable relief "against a state agency or official must be no broader than necessary to remedy the constitutional violation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1086 (9th Cir. 1986). McCarthy [sic] is constitutionally disabled from obtaining injunctive or declaratory relief to stop the Rule 13 proceedings simply because he may have lost face in the community as a result of the publication of

State v. Clarke. The limit of constitutional relief would have been depublication of *State v. Clarke,* or damages flowing from the publication, but Partington never asked for either of these forms of relief, the latter of which clearly would be barred by absolute immunity anyway, and cannot be hear to complain at this stage because his prayer was overbroad. *Merrell Dow Pharmaceuticals v. Thompson,* 106 S. Ct. 3229, 3233 (1986). Partington never asked for the proper relief below and should be held to that forfeiture.

Second, the notion that Partington was entitled to any declaratory or injunctive relief even with respect to the publication of *State v. Clarke,* would also be frivolous under the doctrine of remedial standing enunciated in *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). This case is identical to *Lyons,* because here, as *Lyons* would require, Partington simply cannot make the requisite allegations that he would fail in the future to meet the mandate of *State v. Antone,* 62 Haw. 346, 615 P.2d 101 (1980), or, if he did, that the Supreme Court of Hawaii would necessarily pass over other trial errors, as it did here, so as to reverse on an ineffective assistance claim. The series of assertions necessary to show that Partington would be "realistically threatened" with the possibility of a *sua sponte* reversal for ineffective assistance in one or his own cases was nowhere made in the complaint below, or shown anywhere in the evidence. Under *Lyons,* equitable relief of any kind was totally improper, *see* 461 U.S. at 109, and Judge Kay was right not to even address Partington's various constitutional claims.

Third, and most important of all, Partington's claims of "immediate harm" if take seriously, would make the

assertion of *Younger* abstention impossible. In *every* case in which coercive state court proceedings are initiated, litigants have their freedom of expression chilled, and suffer reputational injuries. But as the Supreme Court said in *Younger* itself, litigants are not entitled to federal equitable relief from injury " 'incidental to every criminal proceeding brought lawfully and in good faith,' " 401 U.S. at 49 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157 (1943)). The Court stressed that, unlike here, where Partington seeks an injunction forbidding the Rule 13 process to run its course, in cases like *Baggett v. Bullitt*, 377 U.S. 360 (1964), "the relief sought was of the course the kind that raises no special problem – an injunction against allegedly unconstitutional state action (discharging the employee) that is not part of a[n important state proceeding]." 401 U.S. at 47 n.4. "[T]he existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* at 51. Seen for what it is, Partington's federal action is nothing more than a broad assault on *Younger's* main premise: that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." *Id.* at 46. Indeed, like many criminal defendants, Partington has made proud statements in the press that "he welcomed the investigation by the Office of Disciplinary Counsel[,] predicted he would be cleared, [and] said his vindication would make the court look 'foolish' for basing its reversal on his performance as defense attorney." App. E.R. 465 ("Criticized attorney calls Court reversal

'ridiculous,' " Honolulu Advertiser (Dec. 29, 1985)). This is what, in America, the criminal process is about, and under *Younger*, it is not enough to claim that the process gives rise to "cost, anxiety, and inconvenience of having to defend."

Finally, even assuming that the Supreme Court of Hawaii's orders gave rise to some reputational injuries that were not the lawful by product of the court's exercise of its basic prerogative to notice plain error, there is no indication on this record that Partington took the steps in *state* court to rectify those issues. If the existence of the Rule 13 proceeding violated his constitutional rights, nothing prevented Partington from applying to the Supreme Court of Hawaii under Haw. R. App. P. 27 or the mandamus or prohibition jurisdiction. If the possibility that public proceedings in the Rule 13 case would give rise to irreparable harm, Partington could have sought a closure order from the Supreme Court of Hawaii. Here there simply are a "panoply of procedures," *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484 (1982) that could have been used – and can be used still – to effectuate appellant's claims to a timely vindication of his claim that he was not ineffective. As the Supreme Court ruled in *Pennzoil*, litigants "cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner." 107 S. Ct. at 1529 n.16. As this Court stated only recently, appellant "had an opportunity to pursue [his] constitutional claim upon appeal in the state courts, and failed to do so. No more is required for *Younger* abstention." *World*

Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, 1083 (9th Cir. 1987).[7]

B. Each of Partington's Substantive Claims is Frivolous.

Even if this Court were somehow to reach the merits of this controversy, there is no warrant for concluding that summary judgment should have been granted to

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[7] Nowhere in appellant's brief does her assert that the "bad faith" and "harassment" exceptions to *Younger* dismissal are even remotely supported by the record. Rule 13 is by no stretch " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it,' " 401 U.S. at 53-54, nor is this a case where the charges have been brought "without a reasonable expectation of obtaining a valid [adjudication]." *Kugler v. Helfant*, 421 U.S. at 126 n.6. It is true that the Rule 13 proceedings are behind the schedule under the Rule, but clearly the time the proceedings have been pending at Partington's request is not chargeable to the State, and for those delays that otherwise exist, there is sufficient ambiguity in state law to keep the continued pendency of the matter within the bounds of good faith under *Kugler* and at the same time offer Partington additional grounds to assert before the Supreme Court of Hawaii why the proceedings must be dismissed. *See e.,g., Chock v. Bitterman*, 5 Haw. App. 59, 678 P.2d 576 (1984) (holding that doctrine of laches may apply against state licensing proceedings but not on facts presented). It cannot be stressed enough that each of appellant's claims that the Rule 13 procedures have not been complied with raises grounds for abstention under the *Pullman* doctrine, 312 U.S. 496 (1941), which this court is obligated to consider in the context of its *Younger* analysis. As the Court ruled in *Pennzoil*, "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." 107 S. Ct. at 1526 n.9.

Partington by the Court below. Review of a summary judgment is de novo. *McCarthy v. Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987). This Court must deny summary judgment if there is "a genuine issue of material fact," and may, on appeal, enter summary judgment on the merits for the appellees if the facts and the record warrant, *see Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970), even though summary judgment was not sought below by the appellees. *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *see Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2554 (1986) (power of courts to grant judgment sua sponte). For the following reasons, even if dismissal on the grounds above was not warranted, summary judgment for the appellees would be and certainly it would be error to grant judgment to Partington.

1. The Due Process Claims Were Meritless.

Partington's procedural due process claims are barred on numerous grounds. First, this court has made plain that it will apply the doctrine of administrative finality to bar claimed violations of procedural due process until such time as the agency has come to a "final decision" under the decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). *See, e.g., Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986). Any sanction upon Partington plainly is not final in a *Williamson County* sense, that is, the relevant state agency, here the state court, has not "arrived at a final, definitive position regarding how it will apply the regulations at issue [Rule 13] to the property at issue [Partington's license]." 473 U.S. at 191. And any

claims for "reputational" injury are clearly barred by *Paul v. Davis*, 424 U.S. 693 (1976). Partington's "status as a matter of state *law*," *id.* at 708, has been completely preserved pendente lite in the Rule 13 proceedings, and this case is thus indistinguishable from *Paul*. Moreover, Partington has done nothing to show that the Supreme Court of Hawaii's ineffective assistance finding, if anything, was more than an act of negligence for which there is no remedy under the Due Process Clause. *See Daniels v. Williams*, 106 S. Ct. 662 (1986); *Davidson v. Cannon*, 106 S. Ct. 668 (1986). Finally, given that the prosecution has a clear motive to protect a conviction, the likelihood of error is not so great as to give rise to a right to an independent "pre-decision" hearing.

2. The First Amendment Claims are Meritless.

Partington's First Amendment contentions are addressed largely by *Younger* itself. The Rule 13 proceedings themselves offend no relevant First Amendment precept, and there can be no claim that the standard of state-law effective assistance, on the facts here, was "vague or overly broad as construed and *applied* to a particular [litigant] in a particular case." 401 U.S. at 47 n.4. *accord, Cameron v. Johnson*, 390 U.S. 611, 619 (1968); *Zwickler v. Koota*, 389 U.S. 241 (1967). *See also Nix v. Whiteside*, 106 S. Ct. 988 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

3. The Sixth Amendment Claim is Frivolous.

Partington's Sixth Amendment Claim is simply frivolous. The Sixth Amendment right to effective assistance is clearly a right of "the accused," and Partington has no standing to invoke the Sixth Amendment because he is plainly not within " 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge College v. Americans United For Separation of Church and State*, 454 U.S. 464, 475 (1982) (citing *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). Clarke, for example, did not appeal the vacatur of his conviction to the Supreme Court of the United States on the ground that the Supreme Court of Hawaii's decision vacating his conviction on *state* constitutional grounds deprived him of the autonomy that the Sixth Amendment guarantees, *see McKaskle v. Wiggins*, 463 U.S. 168 (1984), and it would be unimaginable that, if the Supreme Court of Hawaii allowed Partington to intervene on appeal, that the Supreme Court of the United States would have permitted appellant to prosecute a petition for certiorari to reverse the judgment of reversal. *See Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986). For the same reasons, this Court should not entertain any Sixth Amendment claims on appeal here. Of course, it would be remarkable to hold that a state law finding of ineffectiveness could trigger a violation of the federal right to effective assistance, and the total absence of case support for Partington's "Sixth Amendment" claim suggests any right to counsel claim within this Court's mandate is frivolous.

4. The Equal Protection Claim is Also Meritless.

Partington's claim that Rule 13 violates the Equal Protection clause on its face or as applied is also entirely without foundation. Nothing anywhere in Appellant's Opening Brief suggests that the discriminations between prosecutors and defense counsel written into Rule 13, and between federally ordered ineffectiveness determinations and those ordered in the state courts lack a rational basis. The first sort of discrimination is plainly warranted by the fact the prosecutors who are overzealous in their advocacy are reversed, while prosecutors who are lax fail to advance in their profession. The same cannot be said for defense counsel, and attempts to compare the two would yield the sort of gross discrimination that lies "in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Likewise, it is wholly appropriate for the state courts to confine the Rule 13 proceedings to their own reversals and vacaturs, inasmuch as the records in federal habeas reversals, particularly if there is factfinding with respect to ineffectiveness, are not readily available to the state courts, and, as the Chief Justice acknowledged, it is open to doubt whether the state courts even have the authority to require federal counsel to file the Rule 13 certificates that trigger review and facilitate disposition of the Rule 13 proceeding. There is no "fundamental right" to practice law, *see Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947), and, accordingly, the foregoing rationale bases more than support the alleged discriminations that Partington would subject to federal attack.

C. Costs and Attorneys Fees Should Be Awarded on Appeal

As this Court stated recently in *McCarthy v. Mayo*, 827 F.2d 1310 (9th Cir. 1987), a federal appellate court has authority to award attorneys fees and single or double costs on appeal "when the result is obvious and the arguments on appeal wholly lack merit." *Id.* at 1318 (quoting *Grimes v. Commissioner*, 806 F.2d 1451 (9th Cir. 1986). In awarding fees on appeal, the Court may use the same standards governing the imposition of Rule 11 sanctions in the District Courts. *See in re Itel Securities Litigation*, 791 F.2d 672, 674 (9th Cir. 1986). The "objective good faith" standard under Rule 11 requires, in support of arguments made on appeal, "an objective condition which a competent attorney attains only after 'reasonable inquiry.' " *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1583 (9th Cir. 1987). We believe that these standards are functionally the equivalent of those that apply to government defendants under the objective qualified immunity standards of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See Anderson v. Creighton*, 107 S. Ct. 3034 (1987). If at the time an appeal is filed, it is "apparent" that the positions taken on appeal are meritless "in the light of preexisting law," sanctions should be awarded. 107 S. Ct. at 3039.

We have filed an extensive brief on appeal largely to demonstate [sic] conclusively what the District Court properly concluded in six pages – that Mr. Partington's federal attempts collaterally to attack an ongoing state judicial disciplinary proceeding are plainly barred by the *Younger* doctrine. Because of *Younger*, the District Court did not need to entertain the merits of Partington's claims, and those merits can be disposed of swiftly if the Court for some reason has to reach them. The central

point here is that this Court has repeatedly recognized that *Younger* bars just such attacks on bar disciplinary proceedings, *e.g. Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983); *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 469 (9th Cir. 1984); *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). The manner is which Partington sought to distinguish this case from *Middlesex* simply ignores the manner in which state procedural law is to be construed in light of *Pennzoil*, or simply elevates constitutional interests to a level that *Younger* squarely rejected more than fifteen years ago. Just as under *Anderson*, it should not be necessary for the identical challenge brought here to have been rejected by this court for attorneys fees to be awarded on appeal. This is particularly true in light of 28 U.S.C. § 1919, which allows "just costs" to be awarded when an action is dismissed for jurisdictional reasons.

VII. CONCLUSION

For the foregoing reasons, the judgment should be affirmed and costs and attorneys fees on appeal should be awarded.

Dated: Honolulu, Hawaii, November 30, 1987.

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/s/ Steven S. Michaels
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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, Defendants-Appellees.	)	NO. 87-2375 DC# CV-87-0172-ACK Hawaii

APPELLANT'S REPLY BRIEF*

I. INTRODUCTION AND REQUEST FOR RULE 11 SANCTIONS

A. DEFENDANTS' ANSWERING BRIEF

The Defendants claim in their Answering Brief (at 43-45)[1] that sanctions should be awarded against Plaintiff for his frivolous appeal. Plaintiff wishes to explore this claim that each and every issue raised by him is utterly without merit as well as look at a number of other assertions made in Answering Brief. Upon completion of this examination there will be a substantial question as to whether Defendants' counsel are not themselves guilty of bad faith in raising some of the arguments they did. When it is realized that the Defendants are themselves

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* Covers, tables, addenda, and other material deleted in printing.

[1] Hereinafter Plaintiff/Appellant's Opening Brief will be cited as "O.B." and Defendants/Appellees' Answering Brief will be cited as "A.B."

attorneys, this conduct warrants heavy sanctions. Plaintiff hereby requests appropriate sanctions be imposed against the Defendants pursuant to Rule 11 of the Federal Rules of Civil Procedure and bases this request on the very authorities cited by Defendants (A.B. at 43-45). Now to examine the specific points in question.

B. DEFENDANTS' CLAIMS OF FRIVOLOUSNESS

There are two clear examples of lack of good faith by Defendants' counsel in claiming that Plaintiff's arguments are frivolous. First, the Defendants claim that "there is nothing in the record that would indicate" that Plaintiff has shown that he has been prejudged by the Supreme Court of Hawaii (A.B. at 30). In *State v. Clarke*, Plaintiff was finally adjudged ineffective by the Supreme Court of Hawaii without notice and hearing and after being denied a hearing. Now Plaintiff faces HSCR 13 proceedings in the Supreme Court of Hawaii. In discussing this problem of pre-judgment by an adjudicatory body, the Supreme Court of the United States held that:

> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issue does not result in a procedural due process violation. *Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.* [Emphasis added.]

Withrow v. Larkin, 421 U.S. 35, 57-58 (1975) (as quoted in O.B. at 31.) Plaintiff's argument on this point (O.B. at 30-35) is anything but frivolous.

Second, the Defendants claim that Plaintiff's argument that HSCR 13 as applied violates equal protection is "meritless" because the Chief Justice of Hawaii claimed in a letter that it is open to doubt whether the Supreme Court of Hawaii could take action against an attorney found to have been ineffective by a federal court (A.B. at 42-43) even though HSCR 13 on its face covers such a situation. Considering that there is authority directly on point that the Supreme Court of Hawaii can take action against an attorney for conduct in a federal court, authority which was cited in the Opening Brief (at 22-23), it is difficult to understand how the Defendants could have ignored it in the Answering Brief.[2] This argument of Plaintiff, like the other discussed, is entirely meritorious, something which should be obvious as the Hawaii Association of Criminal Defense Lawyers (representing the criminal defense bar in Hawaii) has moved the file an amicus brief on these issues, *inter alia*, on behalf of Plaintiff in this Court as it did in the District Court.

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[2] Note also that the District Court devoted nearly a page of its six page order (R. 19, E.R. 472-473) refuting what it claimed was Plaintiff's argument that the lack of oral argument before the Supreme Court of Hawaii in the HSCR 13 proceedings denies due process. As noted in the Opening Brief (at 48, n.26), Plaintiff made no such argument, yet the Defendants specifically note this finding as if Plaintiff had in fact argued this point (A.B. at 18).

C. DEFENDANTS' MISREPRESENTATIONS

Not only have claims of frivolousness been made without any rational bases, but the Defendants' counsel have shown a shocking ignorance or indifference to the rules of professional responsibility. DR 7-102(A)(5) provides that:

> (A) In his representation of a client, a lawyer shall not:
>
> > (5) Knowingly make a false statement of law or fact.

There are four clearly false assertions (express or implied) in the Answering Brief. First, the Defendants claim that the Special Master in HSCR 13 proceedings must "expressly 'find[ ] that ineffective assistance of counsel' has occurred" (A.B. at 9-10). The third to last paragraph of HSCR 13 contains the words quoted in the Answering Brief, but the complete sentence in question speaks of the Special Master referring to the Disciplinary Counsel those cases where he found the ineffectiveness (by clear implication, previously found by the court) to have resulted from violations of DR 6-101 (failing to act competently) and DR 7-101 (representing a client zealously). By no stretch of imagination do these words provide for the Special Master to make the core finding that ineffectiveness has occurred (as claimed by the Defendants), but rather they instruct the Special Master what to do where he finds that the ineffectiveness is of either of two specific types. In other words, it is clear that the Special Master is to determine what caused the ineffectiveness, *not* whether the attorney was in fact ineffective.

Second, the Defendants claim that, in his Complaint, Plaintiff "falsely" alleged that he had been found guilty of serious misconduct by the Supreme Court of Hawaii after having been denied a hearing and without an opportunity to defend himself (A.B. at 14). It is difficult to understand how Defendants could make such a claim; this allegation of Plaintiff is clearly true and is what this case is all about. There is no dispute that Plaintiff was denied a hearing by the Supreme Court of Hawaii prior to the briefing in *State v. Clarke* and that he had no other opportunity to defend himself prior to the decision in *State v. Clarke*. It is true that the decision in *State v. Clarke* did not speak of misconduct, but at the oral argument in *Clarke* one justice accused Plaintiff of serious misconduct (R. 14, E.R. 463) and the Honolulu *Advertiser* reported the reversal of Clarke's conviction as arising from Plaintiff's misconduct (R. 14, E.R. 464). There just has never been an issue of Plaintiff's incompetence in *State v. Clarke;* this is a case of potential misconduct or proper trial tactics – nothing more, nothing less!

Third, the Defendants imply that Plaintiff brought the instant civil rights action to block the hearing set down by the Special Master pursuant to HSCR 13 (A.B. at 14-15). In fact, the hearing was set down *after* the instant action was filed (and served) and apparently in response to the realization by the Special Master that he had done nothing in the HSCR 13 proceedings in a year (other than appoint a Special Prosecutor) in violation of the time provisions of HSCR 13. The Defendants' recital of facts on this point is downright misleading.

Fourth, the Defendants claim that it is a "bare assertation" by Plaintiff that he has been adjudged incompetent or guilty of misconduct (A.B. at 27). This claim can only be described as extraordinary. What is this case all about if not the "final adjudication" of ineffectiveness on Plaintiff's part by the Supreme Court of Hawaii? And ineffectiveness in the context of this case arises from either misconduct or incompetence. Fair argument is one thing; blatant mischaracterization is quite another.

D. DEFENDANTS' LACK OF UNDERSTANDING OF PROFESSIONAL RESPONSIBILITY RULES IN CRIMINAL CASES

Turning to issues other than Defendants' misrepresentations, there are a number of truly incredible assertions when viewed in light of the rules of professional responsibility. First, the Defendants make the assertion, in effect, that the attorney/client privilege between Plaintiff and Clarke has been waived by the Supreme Court of Hawaii in spite of Clarke's invocation of the privilege and the absence of complaint by Clarke against Plaintiff (A.B. at 10, 32-33).[3] It is hornbook law that the attorney/client privilege belongs *exclusively* to the client and cannot be waived by anyone else, including the Supreme Court of Hawaii; and a cursory reading of the relevant sections of

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[3] Clarke's second conviction for murder following retrial was affirmed by the Supreme Court of Hawaii in an unpublished opinion in October 1987. In November, Plaintiff met with Clarke and his present attorney to determine if Clarke would not waive the attorney/client privilege. Clarke's response was that he would not waive the privilege now or in the future.

either of the two major encyclopedias reveals this. 97 C.J.S. Witnesses § 307(a) (1957); 81 Am. Jur. 2d Witnesses § 223 (1976). This argument of Defendants is patently without merit.

Second, the Defendants argue that Clarke's failure to appeal the reversal of his own conviction renders Plaintiff's sixth amendment argument frivolous (A.B. at 41)[4] Defendants seem to recognize that Plaintiff could not have appealed the reversal because of the blatant conflict of interest which would have resulted, yet somehow find something significant that Clarke did not appeal that which he had no standing to appeal because he had won. This argument of Defendants is ludicrous beyond words.

Third, the Defendants chastise Plaintiff for failing to ask the Supreme Court of Hawaii to mandamus or prohibition itself in the HSCR 13 proceedings (i.e. a writ directed to the Special Master) (A.B. at 15, 37-38). What words can describe an argument so inherently ridiculous?

Fourth, the Defendants allege that Plaintiff intentionally attempted to prejudice his own client's case for

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[4] A real example of ineffectiveness of counsel in *State v. Clarke* is perhaps found in the State's failure to seek review of the decision of the Supreme Court of Hawaii. Certainly the State failed to follow through on its "clear motive to protect a conviction" (A.B. at 40). Very likely, this failure resulted from the realization that the overwhelming errors at the trial in *State v. Clarke* mandated reversal regardless. See Opening Brief in *State v. Clarke* (R. 1, E.R. 9-139). Defendants also allege that Plaintiff could have pursued his "constitutional claim upon appeal in the state courts, and failed to do so." The state court to which Plaintiff should have appealed from a decision of the Supreme Court of Hawaii is unknown to Plaintiff.

the purpose of "forcing" a reversal on appeal by filing a motion in the Supreme Court of Hawaii (R.1, E.R. 140-156) prior to the briefing in *State v. Clarke* to remand the case to the trial court for a hearing on the trial judge's complaint against Plaintiff to the Office of Disciplinary Counsel (A.B. at 13). It should be obvious that if a defense attorney obtains a reversal of his client's conviction on appeal, his client has hardly been prejudiced! It seems to be beyond Defendants' comprehension that perhaps Plaintiff sought a hearing in order to show that (1) he acted properly at the trial and (2) the trial judge was improperly interferring with the attorney/client relationship on appeal. See the Opening Brief in *State v. Clarke* (R. 1, E.R. 52-53). Further, the Defendants fail to comprehend that once the trial judge complained against Plaintiff, Plaintiff had a duty to so inform his client because of a possible conflict of interest (pursuant to Dr 5-101(A)[5]). Finally, Plaintiff was duty-bound as zealous counsel (by virtue of DR 7-101(A)(1)[6]) to raise the issue of the trial judge's improper interference with the attorney/client

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[5] DR 5-101(A) provides:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

[6] DR 7-101(A)(1) provides in part:

> (A) A lawyer shall not intentionally:
>
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, ...

relationship on appeal. This argument of the Defendants is also without merit.

These issues involving professional responsibility raise the very legitimate question of what interest the state has in challenging the effectiveness of counsel on appeal where the criminal client has not raised the issue and valid explanations *may* exist for the trial tactics in issue. The Defendants speak of an "overriding public interest" in seeing that defense attorneys do not "throw" criminal trials (A.B. at 6), but where is that interest implicated if the issue is not raised by the client? If a client invokes the attorney/client privilege in response to an allegation of ineffectiveness of counsel, then obviously the client is waiving the issue. Any other possibility raises the spectre which haunts the instant case – the creation of conflict between attorney and client to the detriment of sixth amendment rights. This problem is then compounded by the claim of the Defendants, in effect, that the Supreme Court of Hawaii can create such conflict and then deny the attorney standing to vindicate the rights involved (A.B. at 19-20, 41). Note that if the attorney does in fact lack standing, he is literally without any remedy for the wrong done to him, let alone the harm to the sixth amendment interests involved.

E. HSCR 13 IS IRRELEVANT TO THE PRINCIPAL ISSUE OF WHETHER THE *SUA SPONTE* "FINAL ADJUDICATION" OF INEFFECTIVENESS BY THE SUPREME COURT OF HAWAII WITHOUT NOTICE OR HEARING VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS

Perhaps the most inexplicable assertion by the Defendants is the claim that the *only* question before this Court

is whether Plaintiff *has* an adequate opportunity to raise his constitutional questions in the HSCR 13 proceedings (A.B. at 19). The dishonesty of this assertion is blatant. From day one, Plaintiff has asserted that the principal question in this case is whether he *had* an opportunity to raise any issues *before* the decision in *State v. Clarke* (R. 6, E.R. 258-259, O.B. at 27-28). The existence or non-existence of HSCR 13 is irrelevant to this issue because Plaintiff's first, fifth, sixth, and fourteenth amendment rights were violated by the decision of the Supreme Court of Hawaii in *State v. Clarke* and the consequences which flowed therefrom without any reference to HSCR 13. The failure of the Defendants to meaningfully discuss this question with its substantial constitutional implications is inexcusable and should constitute an admission that they have no response to Plaintiff's constitutional claims. Further, Defendants do not contest Plaintiff's claims that there were no legal bases for any of the five specific findings of the Supreme Court of Hawaii in *State v. Clarke* (O.B. at 35-44). This principle question centering on the decision of the Supreme Court of Hawaii which has nothing to do with HSCR 13 cannot be ignored because the constitutional stakes are just too high.

II. THE DECISION OF THE SUPREME COURT OF HAWAII IN STATE V. CLARKE

A. DUE PROCESS

The Defendants' arguments for *Younger* abstention hinge on the decision of the Supreme Court of Hawaii in *State v. Clarke* not being a "final adjudication" that Plaintiff was ineffective as Clarke's counsel. If the decision

was, in law and fact, a "final adjudication, then the *Middlesex* test for abstention has not been met because Plaintiff had no opportunity to raise any issues before that decision.[7] In addressing this issue in the Answering Brief, Defendants' arguments are unintelligible (A.B. at 28-29). About the only point in the Defendants' favor on this issue is the use of the words "the counsel alleged to have been incompetent [sic]" in the second paragraph of HSCR 13. Unfortunately, the implication one might draw from the use of the word "alleged" is refuted by the remainder of HSCR 13 and the facts of this case.[8]

In this case, there are five reasons why the decision of the Supreme Court of Hawaii in *State v. Clarke* was a "final adjudication" of ineffectiveness on the part of Plaintiff:

1. The title of HSCR 13 expressly says it is.
2. The Supreme Court of Hawaii expressly invoked HSCR 13 in its decision (see O.B. at 36).
3. The text of HSCR 13 (with the exception of the single use of the word "alleged") speaks only of the Special Master determining whether "corrective action" should be taken.

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[7] Defendants claim that Plaintiff has received all "process due" (A.B. at 20) is interesting, to say the least, because Plaintiff received no due process whatsoever before he was finally adjudged in *State v. Clarke*.

[8] This is not the only example of careless working is HSCR 13. A reading of the seventh and last paragraphs of HSCR 13 leaves one confused as to whether the Special Master can dismiss HSCR 13 proceedings himself or only so recommend to the Supreme Court of Hawaii. HSCR 13 is truly an example of badly drafted legislation badly applied.

Unlike NJSCR 1:20-2(o)(1) (1982) (O.B. at 54), there is no discussion of the Special Master making findings as to whether the attorney in question was in fact ineffective.[9]

4. The order by which the Supreme Court of Hawaii appointed Defendant Gedan as Special Master states that there was "a finding on ineffective assistance of trial counsel [Plaintiff]" (R. 1, E.R. 174).

5. Defendants themselves speak of Plaintiff as having been *found* "constitutionally ineffective" and not merely of having been alleged to have been ineffective (A.B. at 12, 34).

Nothing could be clearer in this case than the fact that the decision of the Supreme Court of Hawaii in *State v. Clarke* was a "final adjudication" that Plaintiff had been ineffective in the trial in *State v. Clarke*.

B. RIGHT TO COUNSEL

The right to counsel has been referred to as fundamental – perhaps the most important in constitutional law. *Powell v. Alabama*, 287 U.S. 45, 70 (1932). Here, however, Defendants wish to deny to the criminal defense attorney any protection under that fundamental right by denying standing to him (A.B. at 19-20), 41). The instant case implicates two aspects of this sixth amendment right

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[9] Defendants claim that the Special Master under HSCR 13 performs the same function as the New Jersey District Ethics Committees (A.B. at 24) does not wash for the reason given. Further the discovery process in HSCR 13 is not an indication that the decision of the court is other than a "final adjudication" as is suggested by Defendants (A.B. at 27). Discovery is still necessary to determine *why* the ineffectiveness occurred.

to counsel – the presumption of competence and the independence of counsel. *See Strickland v. Washington*, 466 U.S. 668, 688-693, *reh'g denied*, 467 U.S. 1267 (1984) (quoted in O.B. at 14-16). It is appropriate to examine the bases of these two aspects of this fundamental right.

1. The Presumption of Competence

The purpose of the presumption of competence obviously is to protect the defense attorney and judicial system from groundless post-conviction claims of ineffectiveness. The criminal defendant is not protected by the presumption of competence, but rather the presumption protects others from the criminal defendant. Thus, the presumption is *not* a right of the criminal defendant, so Defendants' lack of standing argument can have no validity here.[10] By invoking the attorney/client privilege, Clarke is, in effect, invoking the presumption of competence.

2. Independence of Counsel

The purpose of having the right to "constitutionally protected independence of counsel" obviously is to

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[10] Defendants argue that an attorney accused of ineffectiveness in a criminal case has no right to participate in the criminal appeal (A.B. at 33-34). This argument misses the point that, at the trial level, the accused attorney must have a right to participate and that it is inappropriate to raise this issue on appeal for the first time except in extraordinary cases. Raising ineffectiveness of counsel on appeal for the first time, as in the instant case, should not be permitted for the reasons given in *State v. van Cleave*, 716 P.2d 580, 582-83 (Kan. 1986); *State v. Aliberti*, 401 N.W.2d 729, 732 (S.D. 1987); and *People v. Pope*, 590 P.2d 859, 867-69 (Cal. 1979).

protect both the criminal defendant and the defense attorney from attacks on the criminal defendant's right to counsel. While this right of independence of counsel arises from the criminal defendant's right to counsel, it must be a right belonging to both the criminal defendant *and* the defense attorney. This is apparent from *Strickland v. Washington, supra* at 688 (1984), where the Supreme Court of the United States spoke in terms of the "decisions" and "performance" of the defense attorney being constitutionally protected. Only the defense attorney will *always* be in a position to vindicate this right of independence of counsel for the very reason found in this case – where a court drives a wedge between attorney and client as the Supreme Court of Hawaii (and the state trial judge) did in *State v. Clarke,* only the attorney can vindicate this right because the criminal defendant cannot always vindicate it without sometimes harming his own interests.

III. THE HSCR 13 PROCEEDINGS

A few points above this aspect of the case require comment. The Defendants have not challenged the description Plaintiff gave on the chart in the Opening Brief (at 46) comparing HSCR 13 with HSCR 2 and NJSCR 1:20 except perhaps to the extent that the Defendants are claiming that the decision of the Supreme Court of Hawaii in *State v. Clarke* was not a "final adjudication" thereby eliminating any issue of HSCR 13 proceedings being post-deprivation of rights proceedings.[11] The lack

[11] Note that the Defendants do not meaningfully address this issue of HSCR 13 proceedings being post-deprivation of rights proceedings (see O.B. at 28-29).

of confidentiality in HSCR 13 proceedings[12] is not disputed, and the Defendants apparently concede that the burden of proof is on the attorney (adjudged ineffective by a court) in HSCR 13 proceedings (A.B. at 27).

As to Plaintiff's equal protection arguments, the Defendants have conceded that the assertion of the Chief Justice of Hawaii that prosecutorial incompetence usually results in acquittals (see O.B. at 19, n.12) is incorrect in that convictions do indeed result from prosecutorial incompetence (A.B. at 42). This concession substantiates Plaintiff's claim that there is no rational basis to exclude prosecutors from the scope of HSCR 13. Secondly, the assertion of the Defendants that the records in federal habeas "reversals" are not readily available to the state courts is just plain wrong. The federal writ must be served on the appropriate state official in order for a

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[12] There is a limited provision for confidentiality in HSCR 13. Where the Special Master finds that the ineffective assistance resulted from violations of either DR 6-101 or DR 7-101, *only* the Special Master's finding and reference are confidential. The remaining portion of these HSCR 13 proceedings and all other HSCR 13 proceedings are public record. Note that the effect of referral to the Disciplinary Counsel under HSCR 13 is to short-circuit the due process protection of HSCR 2. Also, the Defendants chastise Plaintiff for publicly welcoming an investigation of his conduct in *State v. Clarke* and then bringing this action (A.B. at 37). This criticism fails to consider two salient facts. Plaintiff welcomed an investigation by the Office of Disciplinary Counsel pursuant to HSCR 2 with its full due process protections including confidentiality. Secondly, Plaintiff did not know then that Clarke would invoke the attorney/client privilege as Clarke had been willing to testify when Plaintiff sought a pre-deprivation of rights hearing from the Supreme Court of Hawaii (R.6, E.R. 275-276).

successful Petitioner to gain release, and the writ also must be filed in the state court where the conviction occurred if the conviction itself is to be set aside.

IV. CONCLUSION

The instant case prevents very substantial constitutional questions.[13] Reduced to one of its essentials, Plaintiff asks this Court to adopt as a rule of constitutional law that, in the absence of evidence irrefutably showing ineffectiveness, an appellate court may not *sua sponte* adjudge an attorney to have been ineffective without prior notice and a hearing being afforded to the attorney. The Sixth Amendment requires no less.

DATED: Honolulu, Hawaii, December 14, 1987.

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Appellant

/s/ Earle A. Partington
EARLE A. PARTINGTON
Plaintiff/Appellant Pro Se

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[13] The Defendants' claim that Plaintiff has suffered no damages cognizable in law (A.B. at 33-34) has been severely shaken by a recent event. The District Court just denied Plaintiff's application to be restored to the Federal Criminal Indigent Panel for the District of Hawaii based on *State v. Clarke*. Plaintiff has filed for a writ in the nature of mandamus in this Court to compel the District Court to put him on the Panel. *Partington v. District Court*, No. 87-7526. A motion to consolidate that case with the instant case was filed with this brief.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, Defendants-Appellees.	)	NO. 87-2375 DC# CV-87-0172-ACK Hawaii

HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AMICUS CURIAE BRIEF*

I INTRODUCTION

HACDL[1] accepts the Statements of Jurisdiction, Standard of Review, Issues and the Case in Appellant PARTINGTON's Opening Brief. While HACDL joins the arguments in PARTINGTON's Opening and Reply Briefs, HACDL's interests are beyond those of the named litigants and thus require the argument supplementation supplied herein.

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* Covers, tables, addenda, and other material deleted in printing.

[1] The following abbreviations are used herein:

HACDL = Hawaii Association of Criminal Defense Lawyers
OB = Appellant's Opening Brief
AB = Appellees' Answering Brief
ER = Appellant's Excerpts of Record
HSCR = Hawaii Supreme Court Rule

Further, note is made that statements by the state trial judge and state Supreme Court justice, as relied upon by PARTINGTON and Appellees GEDAN and CHANG, show there is no question as to whether PARTINGTON was actually competent; rather the question presented is whether he engaged in misconduct by intentional acts or proper trial tactics: "Mr. Partington intentionally attempted to make reversible error" (AB 13), "one of the justices of the Supreme Court of Hawaii accused [PARTINGTON] of being deliberately incompetent" (OB 3). HACDL cannot take a position as to whether PARTINGTON was in fact guilty of misconduct because no hearing was held on the issue.

II. SIXTH AMENDMENT RIGHTS

"Government violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). Thus, the Sixth Amendment not only guarantees that an accused will receive competent counsel, it also provides a criminal defense lawyer with necessary independence.

The Hawaii Supreme Court in this matter, however, has stripped PARTINGTON of his independence and shown in its widely publicized opinion in *State v. Clarke* (Haw.No. 10041 12/27/85 unpublished) (ER 281-378) that it will second guess an attorney – even where no claim of ineffective assistance has been raised by the accused and

where, by necessity, the prosecutor must argue the attorney's effectiveness to protect the conviction. This determination of ineffectiveness, without notice or hearing, warns criminal defense lawyers that they cannot be independent or they risk judicial creation of a conflict in violation of the attorney's "duty to avoid conflicts of interest." *Strickland v. Washington, supra,* 466 U.S. at 688, 104 S.Ct. at 2065.

This conflict is particularly dangerous where, as at bench, GEDAN and CHANG claim that the state-created conflict even removes the attorney-client confidentiality: an attorney in this situation "could not possibly be in privity with his former client on the issue of ineffectiveness" (AB 9), " '[a] lawyer may reveal . . . [c]onfidences or secrets necessary . . . to defend himself against an accusation of wrongful conduct.' " (AB 10) Thus, the state has interfered in the attorney-client relationship and contradicts the "presum[ption] that the lawyer is competent to provide the guiding hand that the defendant needs," *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984).

This Court has already discussed the proper method for determination of ineffectiveness, even when it is the criminal defendant who raised the issue. In *United Staes v. Kazni,* 576 F.2d 238, 242 (9th Cir. 1978), the Court noted, "normally such a claim cannot be advanced without the development of facts outside the original record." In *United States v. Porter,* 431 F.2d 7, 11 (9th Cir. 1979), the Court provided that in extreme cases "the failure of the trial court to take note sua sponte of the problem might constitute plain error which may be considered on direct appeal."

Similar holdings exist in other federal and state jurisdictions. "[C]laims of inadequate representation cannot be determined on direct appeal where such claims were not raised before the District Court and there has been no opportunity to develop and include in the record evidence bearing on the merits of the allegations." *United States v. Rodriguez*, 582 F.2d 1015, 1016 (5th Cir. 1978) (per curiam). "In some cases, however, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [citation omitted] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.' [citation omitted]" *People v. Pope*, 590 P.2d 859, 867 (Cal. 1979). "Except in the most unusual cases, to assert a claim of ineffective assistance of counsel without any independent inquiry and investigation apart from reading the record is questionable to say the least." *State v. Van Cleave*, 716 P.2d 580, 583 (Kan. 1986).

The rule in this country as to raising the issue of ineffective assistance of counsel for the first time on appeal is either that the issue may *not* be raised or may be raised only in extraordinary circumstances where the evidence of ineffectiveness in the appellate record is irrefutable – circumstances *not* existing in *State v. Clarke* (see OB 35-44). *Balder v. Missouri*, 712 S.W.2d 692 (Mo.App. 1986); *Barry v. State*, 675 P.2d 1292 (Alaska App. 1984); *Blanco v. Wainwright*, 507 So.2d 1377 (Fla. 1987); *Clayton v. Kelly*, 357 S.E.2d 865 (Ga.App. 1987); *Commonwealth v. Westcott*, 523 A.2d 1140 (Pa.Super. 1987); *Dossey v. State*,

489 So.2d 662 (Ala.Cr.App. 1986); *Duross v. State*, 494 A.2d 1265 (Del.Super. 1985); *Havis v. State*, 506 So.2d 3 (Fla.App. 1987); *In re Mecier*, 460 A.2d 472 (Vt. 1983); *Jackson v. State*, 449 A.2d 438 (Md.App. 1982); *Morse v. People*, 452 P.2d 3 (Colo. 1969); *Rogers v. State*, 711 S.W.2d 461 (Ark. 1986); *State v. Aliberti*, 401 N.W.2d 729 (S.D. 1987); *State v. Felder*, 351 S.E.2d 852 (S.C. 1986); *State v. Painter*, 402 N.W.2d 677 (Neb. 1987); *State v. Rogers*, 428 So.2d 932 (La.App. 1983); *State v. Slapnicka*, 376 N.W.2d 33 (N.D. 1985); *State v. Sparks*, 672 P.2d 92 (Utah 1983); *State v. Walker*, 403 A.2d 1 (N.J. 1979); *State v. Whitsel*, 339 N.W.2d 149 (Iowa 1983); *White v. Commonwealth*, 695 S.W. 2d 438 (Ky.App. 1985); *Wright v. State*, 513 A.2d 1310 (Del.Super. 1986).

The above shows that the Hawaii Supreme Court's action would have been improper even if the criminal defendant had raised the issue of effectiveness. Coming as it did *sui sponte*, and without notice or hearing, it impaired substantially and impermissibly the Sixth Amendment rights that flow to both criminal defense attorneys and their clients. Now, the message from Hawaii's highest court is that strong advocacy may result in interference in the attorney-client relationship and censure of the lawyer without due process. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause . . . " *Strickland v. Washington, supra*, 466 U.S. at 688, 104 S.Ct. at 2065.

III. HSCR 13

The previous section discussed the constitutional harm involved when a court makes a *sui sponte*

determination of ineffectiveness without notice or hearing. This section discusses a symptom of that harm, HSCR 13 (Appendix "A").

GEDAN and CHANG admit that PARTINGTON has already been injured by the Hawaii Supreme Court's actions, " . . . enjoining the Rule 13 proceeding as unconstitutional, either on its face, or as applied, would not redress Partington's injuries." (AB 33). Thus, the HSCR 13 "PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES" are merely further action by the state *after* the Hawaii Supreme Court has already finally determined ineffectiveness. These additional proceedings create additional chilling of the Sixth Amendment rights discussed in the previous section.

GEDAN and CHANG argue that there is a "rational basis" for HSCR 13's facial discrimination between prosecutors and criminal defense lawyers, in part because "over-zealous" prosecutors are reversed and "lax" prosecutors "fail to advance in their profession." (AB 42). As noted before the District Court (ER 447-448) there are many cases where ineffective prosecutors have caused convictions and appeals by their misconduct or incompetence. See Appendix "B" for this nonexhaustive list of A.L.R. and L.Ed.2d Annotations.

Therefore prosecutor error injures a criminal defendant just as much as defense counsel error. For example, the Hawaii Supreme Court has held that the admission of highly prejudicial hearsay requires reversal, "although defense counsel has failed to object, when the conduct of the prosecution in knowingly and deliberately injecting

this prejudicial matter into the proceedings has combined with the demonstrated ineptitude of defense counsel" *State v. Pastushin*, 58 Haw. 299, 302-303, 568 P.2d 504 (1977), f.n. omitted. Had HSCR 13 been in effect at the time of *Pastushin*, only the defense attorney would have been forced to defend himself in the automatic and immediate proceedings which could result in "corrective action" as severe as temporary suspension or disbarment. HSCR 13, 2.

Thus, HSCR takes the constitutional violations of the Sixth Amendment one step further – to violate also the right to equal protection. Impingement of such constitutional protection requires strict scrutiny of HSCR 13; an inspection by this Court to see if the State selected the least restrictive alternative available. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973). This standad of review is particularly appropriate and necessary here, as "[i]n cases such as *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed 891 (1956) and *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) . . . These cases are grounded in the criminal justice system, a governmental monopoly in which participation is compelled." *Maher v. Roe*, 432 U.S. 464, 471, f.n. 6, 97 S.Ct. 2376, 2381, 53 L.Ed.2d 484 (1977).

GEDAN and CHANG have not shown that HSCR 13 is the least restrictive alternative available. The Chief Justice of the Hawaii Supreme Court has explained that the intention of the Rule is "to help prevent future violations of defendant's constitutionally protected right to effective assistance of counsel by providing retraining for attorneys who have unintentionally been ineffective as

counsel in a criminal defense case." (ER 445). Since the requirement that a criminal defendant have the assistance of effective counsel is based upon the right to receive a fair trial, *United States v. Cronic, supra,* 466 U.S. at 658, 104 S.Ct. at 2046, and because HSCR 13 actually strains the attorney-client relationship, it is clear that the Rule is actually counter-productive.

Additionally, the HSCR 13 goes beyond "providing retraining for attorneys who have unintentionally been ineffective" (ER 445) and controls counsel who have made informed tactical decisions disliked by the appellate courts of Hawaii. Such action occurred in the instant matter. If "retraining" is the goal, than this one-sided, immediate and automatic restriction of constitutional rights is not the answer.

IV. SANCTIONS

GEDAN and CHANG complain that they "have filed an extensive brief on appeal" (AB 44) and ask for sanctions (AB 2-3, 20-21, 43-45). Note is made that their brief would have been much shorter if their Statement of the Case (AB 4-18) had stuck to the facts rather than duplicate many of their arguments or make meritless arguments: (e.g. claims at AB 9-10 that attorney-client confidences are waived if a third party such as the court raises ineffectiveness).

Their extensive request for sanctions further illustrates the chilling effect on constitutional rights discussed in the previous sections. If a criminal defense lawyer is too much of an advocate, he or she risks censure without notice or hearing and possible additional punishment under HSCR 13; then if he or she seeks redress in the

federal courts, risk of sanctions is also "hammered home". If any sanctions are proper herein, they are those requested by PARTINGTON and for the costs of this brief.

V. CONCLUSION

HACDL finds commendable, and shares, the Hawaii Supreme Court's desire to deal with the problem of ineffective assistance of counsel. However, HACDL believes minimum due process and the Sixth Amendment require prior notice and hearing before an appellate Court makes an adjudication of ineffectiveness. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland v. Washington, supra*, 466 U.S. at 693, 104 S.Ct. at 2067. Additionally, HACDL believes the problem of ineffective counsel applies equally to both prosecutors and criminal defense lawyers and must be dealt with equally.

HACDL asks that this Court grant Appellant PARTINGTON's requested relief and to impose sanctions against Appellees GEDAN and CHANG in favor of Appellant and *Amicus Curiae*.

DATED: Honolulu, Hawaii, December 15, 1987.

Respectfully submitted,

HAWAII ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS

By /s/ John A. Thompson
JOHN ASHFORD
THOMPSON
Chair, Amicus Committee

AMICUS CURIAE

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN; HOWARD T. CHANG, Defendants-Appellees.	)	C.A. NO. 87-2375
	)	D.C. NO. 87-0172-ACK
	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

PETITION FOR REHEARING*

Defendants-Appellees Joseph M. Gedan and Howard T. Chang pray, pursuant to FRAP 40, that this Court grant rehearing and reverse those parts of the panel decision granting Earle A. Partington and his Amicus costs and fees pursuant to FRCP 11 for defense of Appellees' motion for attorneys' fees. *Partington v. Gedan*, No. 87-2375, Slip op. at 2190-92 ["Slip op."].

In filing this Petition, Appellees do not ask that our claim for attorneys' fees be granted. We waive any appeal from tne denial of that claim, and seek only reversal of the judgment granting Rule 11 sanctions for Appellees' filing of that claim. In the interest of justice Appellees also unconditionally waive costs to which they would otherwise be entitled under FRAP 39.

* Covers, tables, addenda, and other material deleted in printing.

I. INTRODUCTION, RULE 40 CERTIFICATION, AND SUMMARY OF REASONS WHY REHEARING OF THE ATTORNEYS FEE AWARD SHOULD BE GRANTED

As an institutional litigant, the Department of the Attorney General of the State of Hawaii has an ongoing interest in the proper application of FRCP Rule 11 and its appellate analogues, *e.g.*, FRAP 38, and 28 U.S.C. § 1912. For this very reason, we fully agree with the concerns expressed by *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421 (7th Cir. 1988), on which the panel relies to impose sanctions for our sanctions request. There is no, nor should there be, protection for "baseless litigation." *McDonald v. Smith*, 472 U.S. 479, 484 (1985). The sanctions rules are no less susceptible to abuse than other grounds for relief. When they are abused, the Court should act to deter such abuse.

The Department and Appellees submit, however, that this is simply the wrong case in which to apply a *Meeks* sanction.[1] The Rule 38 request here was not a "knee-jerk"

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[1] Generally, our Department only sparingly seeks sanctions on appeal, and eschews such requests in the vast run of cases in which we are appellees, even when co-appellees have not done so. *See, e.g., Goding v. Ariyoshi*, No. 88-2751 (9th Cir. State' Brief Jan. 25, 1989) (no fees sought; fees sought by co-appellees); *Hall v. Okabayashi*, No. 88-2777 (9th Cir. State's Brief Oct. 21, 1988) (no fees sought; fees sought by co-appellees); *Coakley v. Sunn*, No. 88-1676 (9th Cir. argued Nov. 18, 1988) (no fees sought); *Figueroa v. Sunn*, No. 87-2572 (9th Cir. argued Nov. 18, 1988) (no fees sought); *Erum v. Waihee*, No. 15156 (9th Cir. argued Nov. 17, 1988) (42 U.S.C. § 1988 cited but no prayer for fees); *Cammack v. Waihee*, No. 87-15073 (9th Cir. argued Nov. 14, 1988) (fees sought only if Court finds that 28 U.S.C. § 1919 so provides; sanctions sought by co-appellees); *Kanekoa v. City*

(Continued on following page)

reaction. *See DeWitt v. Western Pacific Railway Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). It was a considered motion based on our view, with which the majority agreed, that abstention under the *Younger* doctrine was required because the Hawaii Rule 13 scheme under review was "strikingly similar" to that in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 432 (1982). *See* Slip op. at 2174-75 (comparing *Middlesex*). It was also based on our view, with which the panel also agreed, that any colorable issue under *Middlesex* was resolved by the heavy burden imposed on Partington by *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), of having to show procedural inhospitality in the state courts by "unambiguous authority" – a burden the majority found Partington failed to carry. Slip op. at 2177, 2178, 2182

(Continued from previous page)

and County of Honolulu and State of Hawaii, No. 87-2636 (9th Cir. argued August 9, 1988) (fees waived even though granted below under Rule 11); *Stop H-3 Association v. Dole*, No. 87-2204 (9th Cir. Mar. 20, 1989) (no fees sought); *Agsalud v. Pony Express Courier Corp.*, 833 F.2d 809 (9th Cir. 1987) (no fees sought); *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 210 (2d Cir. 1987) (no fees sought); *Charley's Taxi Radio Dispatch v. SIDA*, 810 F.2d 869 (9th Cir. 1987) (no fees sought); *Hall v. Hawaii*, 791 F.2d 759 (9th Cir. 1986) (*"Hall I"*) (42 U.S.C. § 1988 cited, but no prayer for fees). In four appeals, including this one, Rule 38 fees were sought. *See McCarthy v. Mayo*, 827 F.2d 1310 (9th Cir. 1987) (denying Rule 38 sanctions); *Nolan v. State of Hawaii*, 841 F.2d 1129 (9th Cir. 1988) (mem.) (fees granted); *Hall v. State of Hawaii*, No. 88-15058 (9th Cir. brief filed Nov. 17, 1988) (fees sought for appeal relitigating matters decided in *Hall I*.). We are aware of no case in which we have sought sanctions as an appellant.

(citing *Pennzoil*).[2] Our effort to extend *Pennzoil* so the panel would find Partington's arguments frivolous has not prevailed, but this does not make our request frivolous. *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1583, (9th Cir. 1987).

Appellees thus file this Petition, and undersigned counsel certifies that rehearing is warranted, for three basic reasons.

First, in awarding sanctions on the basis of our request for attorneys fees on appeal, the panel misapprehends our request for attorneys' fees. Preliminarily, we based our request for fees not just on Rule 38, but on 28 U.S.C. § 1919, which may allow fees, irrespective of whether any of Appellant's arguments were frivolous.[3] More importantly, while Appellees argued in our brief in chief that many of Partington's underlying claims were frivolous, *see* Slip Op. at 2192, that was not the focus of our request for sanctions. The "central point" of our Rule 38 request was that Partington's reasons why *Middlesex*

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[2] Partington did not even argue that the "bad faith" and "exceptional circumstances" exception to *Younger* applied, and, as the panel majority shows, those exceptions are clearly inapt. *See* Slip op. at 2186-88. The court also swiftly disposes of Partington's attack on the accrued effects of *State v. Clarke*, which we contend is also barred by *Younger*, on the proper ground that Appellant did not preserve this novel claim below. *Id.* at 2190.

[3] *See* Ans. Br. 2, 45. A fee award under § 1919 depends on the claim that *Younger* need not even by reached because Partington's claims are not ripe. *See Schultz v. National Coalition of Hispanic Mental Health and Human Services Organizations*, 678 F. Supp. 936, 939 (D.D.C. 1987) (fees granted under §§ 1447 & 1919).

was inapt and *Pennzoil* was overcome were frivolous. *See* Ans. Br. 44.

Second, fairly read, the sanctions request we did make was not frivolous. As illustrated by two recent Supreme Court decisions, whose benefit the Court did not have when this case was submitted, Partington's uncharitable view of Rule 13 defies rules of construction dating back more than 185 years and which are "beyond debate." *Debartolo Corp. v. Florida Gulf Coast Trades Council*, 108 S. Ct. 1392, 1397 (1988). Adoption of Partington's view would have been not just reversible error, but "plain error." *Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988). Sanctions are allowed when the result is "obvious," or a defense, even if unrelated to the merits, undermines a party's claim "at a stroke."[4] Indeed, the Courts of Appeals routinely punish lawyers who wrongly impugn the integrity of judges.[5] It was not – and should not be – sanctionable to seek to vindicate these holdings when the charge is not just that a single judge, but that the entire State of Hawaii judiciary, is improperly biased.

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[4] *Hudson v. Moore Business Forms*, 836 F.2d 1156, 1163 (9th Cir. 1987); *In re Peoro*, 793 F.2d 1048, 1052 (9th Cir. 1986); *see In re Mooney*, 841 F.2d 1003, 1006 (9th Cir. 1988); *Lake Nacimiento Ranch v. San Luis Obispo*, 841 F.2d 872, 880 (9th Cir. 1988); *Golden Eagle Dis. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986).

[5] *See Maier v. Orr*, 758 F.2d 1578 (Fed. Cir. 1985); *INVST Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391 (6th Cir. 1987); *Glass v. Pfeffer*, 849 F.2d 1261 (10th Cir. 1988); *McLaughlin v. Union Oil Co.*, No. 88-1374 (7th Cir. 1989); *cf. Davis v. Crush*, 862 F.2d 84 (6th Cir. 1988) (sanctions for ignoring *Younger* reversed only because no proceedings pending); *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1988) (rejecting bias claim).

Third, the sanctions against Appellees are improper because of the procedure by which the "request" for sanctions (Slip op. 2190) was raised. Here, sanctions were imposed based upon a "request" that was not properly – or at least not clearly – before the Court. *See Tom Growney Equipment v. Shelly Irrigation, Inc.*, 834 F.2d 833 (9th Cir. 1987); *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 127 ("*ABA Guidelines*").

No motion for sanctions against Appellees was filed in the entire year the Answering Brief was on file. Rather, the "request" on which the Court acted was made in the Reply, and in an amicus brief filed after the Answering Brief was lodged. Neither called for (or allowed, absent leave of court) a response. Nor did the panel at argument state that a sanctions motion was pending against Appellees. *See* Decl. of Susan Gochros, March 24, 1989. For this added reason, the sanctions should be reversed.

II. REASONS FOR GRANTING THE PETITION FOR REHEARING.

A. Rehearing Should Be Granted Because the Court Has Misapprehended Appellees' Request for Attorneys Fees.

In imposing sanctions upon Appellees, the Court holds that Partington's underlying first amendment, procedural due process, and equal protection claims "are important and will require careful and detailed examination," and "to claim Rule 38 sanctions for Partington's

bringing them to our attention is the vice described by the Seventh Circuit in *Meeks*." Slip op. at 2192.[6]

In basing sanctions on this reading of the Answering Brief, the Court has misapprehended why Appellees sought fees. Appellees did, in one subject heading in the merits part of the brief, claim all of Partington's underlying claims were frivolous. Ans. Br. 34.[7] But this was *not* the reason why we sought sanctions:

> The central point here [why sanctions are sought] is that this Court has repeatedly recognized that *Younger* bars just such attacks on bar disciplinary proceedings, *e.g.*, *Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983); *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 469 (9th Cir. 1984); *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). The manner in which Partington sought to distinguish this case from *Middlesex* simply ignores the manner in which state procedural law is to be construed in light

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[6] Noticeably, the Court does not suggest that Partington's "Sixth Amendment" claim is well-founded or even non-frivolous.

[7] Appellees' characterization of Partington's claims, in this isolated subject heading, although strong, is not an independent ground for sanctions. "[C]ourts 'should not be empowered to sanction for the level of assurance used by the brief-writer,' " *Golden Eagle Distr. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986), for to do otherwise would "blur the roles of attorneys and judges over the proper reading of legal precedent." *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987). Indeed, the Court finds sanctions are warranted solely because of its view that our Rule 38 request was frivolous. Slip op. at 2192. Because that request, as this Petition demonstrates, ought not be punished, the sanctions award against us should be reversed.

> of *Pennzoil*, or simply elevates constitutional interests to a level that *Younger* squarely rejected more than fifteen years ago. Just as under *Anderson* [*v. Creighton*, 107 S. Ct. 3034 (1987),] it should not be necessary for the identical challenge brought here to have been rejected by this court for attorneys fees to be awarded on appeal. Ans. Br. at 44.

Indeed, Appellees' request for attorneys' fees was not based only upon a contention that Partington's *Younger* arguments were frivolous. It was independently based on the claim that, since Partington's claims were premature, or otherwise barred for want of jurisdiction, fees should be awarded under 28 U.S.C. § 1919. *See* Ans. Br. 45. That statute provides that "just costs" are to be awarded "[w]henever any action or suit is dismissed in any district court . . . for want of jurisdiction." At least one Court has construed the provision to generate an award of attorneys fees to the party improperly haled before the Court. *See Schultz v. National Coalition of Hispanic Mental Health and Human Services Organizations*, 678 F. Supp. 936, 939 (D.D.C. 1987). Frivolousness is irrelevant to this theory of attorneys' fees.

Although the panel affirms a dismissal without prejudice under *Younger*, there is a very strong argument that the same result is required because the District court had no subject matter jurisdiction to begin with (and that 28 U.S.C. § 1919 applied). *See Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 632-33 (1986) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in the judgment). As this Court observed recently, "[r]egardless of the type of claim, it is generally impossible to determine the extent of the infringement

absent a final determination by the relevant governmental body." *Sinaloa Lake Owners Association v. City of Simi Valley*, 864 F.2d 1475, 1481 (9th Cir. Jan. 6, 1989). And as the Supreme Court ruled only last month, even First Amendment claims "can only be reviewed when (or if) [state remedies] are enforced." *Fort Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, 4184 (U.S. Feb. 21, 1989). The panel rightly concludes there has been no final state court ruling against Partington, Slip op. 2183. Thus there is thus no jurisdiction here, or in the federal forum where under *Feldman* Partington may appeal. "[S]ome possible self-censorship," the Court held, "is not enough." 57 U.S.L.W. 4184.

Here, despite suggestions that Rule 11 sanctions might be proper for premature invocation of federal jurisdiction, *see Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 880 (9th Cir. 1988), Appellees did not assert as a basis for fees that Partington's jurisdictional claims were frivolous. Rather, we asserted Partington's claims should have been dismissed, *inter alia*, for want of jurisdiction, and that fees should have been awarded automatically under § 1919. *See* Ans. Br. 2, 20, 39, 45. Indeed, the majority suggests that Partington's claims attacking the accrued effect of *State v. Clarke* might be barred for want of jurisdiction. *See* Slip op. at 2189-90. Nowhere does the Court suggest that Appellees' attorneys fee request, in light of our claim under the "Just Costs" statute (28 U.S.C. § 1919), was, "as a whole," of a "frivolous" or "harassing" nature. *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir. 1988). The Court's principal concern is that sanctions were

sought upon an allegation that all of Partington's underlying claims were frivolous. As we have shown, that was not our reason for asking for fees.

For these reasons alone, the Court should grant rehearing and reverse the Rule 11 sanctions against the Appellees.

B. Rehearing Should Be Granted Because the Court, in Concluding that it was Frivolous to Claim Partington Should Be Sanctioned for Seeking to Evade Younger Abstention, Overlooks Recent Controlling Supreme Court Precedent, and a Wide Array of Precedent Authorizing the Sanctions Appellees Had Sought.

Although the above-described misapprehension of our attorneys fees request ought to be sufficient to require rehearing, we recognize the Court also holds that "Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent" and were "[f]ar from being frivolous." Slip Op. at 2191. To the extent the Court relies on this view to support the punishment of our Rule 38 attorneys' fee request, the Court, in light of recent Supreme Court precedent, and a substantial body of circuit authority, should reconsider that logic.

As noted above, and in the Answering Brief, what we believed made Partington's anti-*Younger* arguments worthy of sanctions was not just *Middlesex*, but *Pennzoil*. The premise of our Rule 38 claim was that, while *Pennzoil* did not exist when the complaint was filed, it did exist at the time of the Opening Brief. Our request for sanctions was premised on the notion that "[c]ounsel who are admitted to practice in a federal court take on themselves the

obligation to know the relevant law." *In re Mooney*, 841 F.2d 1003, 1006 (9th Cir. 1988). Part of that "law," when the Opening Brief was filed, was *Pennzoil*, and Partington knew or ought to have known that *Pennzoil* "must be followed." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). The Court's analysis of "whether Partington would be able to raise his serious constitutional challenges to Rule 13 in the Rule 13 proceedings" (Slip Op. 2191) was guided throughout by *Pennzoil*. *Id.* at 2177, 2178, 2182. The Opening Brief did not even cite *Pennzoil*.

In addition to the foregoing, two recent decisions from the 1988 Term, handed down after this case was submitted, confirm why colorable arguments could be made that, under Rule 38, Partington's reasons for distinguishing *Middlesex* merited sanctions.

In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), the Seventh Circuit, affirming a preliminary injunction ostensibly aimed at protecting First Amendment rights, construed local law, as Partington did in this case, as broadly barring protected speech.

The Supreme Court, in a sharply worded rebuke, reversed:

> [W]hile we ordinarily defer to lower court constructions of state statutes, see *supra* at 2500, we do not invariably do so, see *Virginia v. American Booksellers Assn.*, *supra*, 484 U.S., at ___, 108 S. Ct., at ___. We are particularly reluctant to defer when the lower courts have fallen into plain error, see *Brockett v. Spokane Arcades, Inc.*, *supra*, 472 U.S., at 500, n.9, 105 S. Ct. at 2800, n.9, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the

> well-established principle that statutes will be interpreted to avoid constitutional difficulties. See, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *Cf. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 108 S. Ct. 1392, ___ (1988).

DeBartolo even more power fully shows the "plain error" in Partington's arguments. There, the Court rejected the NLRB's *own* view of its enforcing statute on the basis that the Board's view was not sufficiently generous to constitutional concerns. Agreeing "statutory interpretation by the Board would normally be entitled to deference," the Court held that "[a]nother rule of statutory construction, however, is pertinent." 108 S. Ct. at 1397.

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . *This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), *and has for so long been applied by this Court that it is beyond debate.*

Id. (emphasis added). The basic precept of Rule 11 (and Rule 38) is that a lawyer is not free to challenge principles that are "beyond debate." Partington's appeal to this Court was premised centrally on just such sorts of challenges.

Partington's appeal was also premised on attacks on the fairness of our state judges. In *McLaughlin v. Union Oil*

of California, No. 88-1374 (7th Cir. Feb. 24, 1989), the Court held:

> Totally without merit . . . is the company's argument that the administrative law judge should have disqualified himself for bias because he ruled against the company on certain discovery matters. Indeed, the argument is frivolous. Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it "in" for the party for reasons unrelated to the officer's view of the law, erroneous as that view might be.

Indeed, no one ought to know better than Partington the rigorous standards applied to a challenge to a judge's fairness. In *Maier v. Orr*, 758 F.2d 1578 (Fed. Cir. 1985), the Court condemned a motion for recusal, in which Partington participated at least in part, that lacked clear, sworn, competent proof. The Court held:

> The assertion that a judge improperly participated in a case from which he or she should have recused constitutes a charge most grave. Counsel should not make such an assertion precipitously or recklessly, nor on unsupported rumor, conjecture and speculation. To do so is to trifle with the court[.]

Id. 1583; *Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988); *INVST v. Chem-Nuclear Sys.*, 815 F.2d 391, 402-03 (6th Cir. 1987).

Appellees' motion to compel Partington to bear our attorneys fees on appeal sought only to vindicate these principles on the basis that, in this situation, where Partington had not even given the state judges an opportunity to recuse themselves, the logic of the foregoing cases applied a fortiori. *Pennzoil*, 481 U.S. at 15.

Given *Union Oil, Maier, Glass,* and *INVEST,* where unmet burdens borne by those moving for recusal led to sanctions, punishing Appellees for seeking to vindicate those burdens would yield anomalous incentives. It would encourage the very "sweeping" requests for federal preemptive recusal orders directed at state judges that the Supreme Court has condemned as "invert[ing] traditional abstention reasoning." *Moore v. Sims,* 442 U.S. 415, 442 (1979).

That Partington might have colorable underlying federal claims does not control whether our sanctions motion was frivolous. Even litigants with good claims may incur sanctions because of a time bar, jurisdictional impediment, or a prior judgment. *See ABA Guidelines,* 121 F.R.D. at 119-20 (*citing, e.g., International Ass'n of Machinists v. Boeing Co.,* 833 F.2d 165, 172 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 1488 (1988)). Our efforts to extend this reasoning to include Partington's efforts to escape *Younger* have not prevailed in this Court, but were not frivolous.

As this Court stated in the leading case of *Golden Eagle Distributing Corp. v. Burroughs Corp.,* 801 F.2d 1531 (9th Cir. 1986):

> Rule 11 does not apply to the mere making of a frivolous argument. The Rule permits the imposition of sanctions only when the "pleading, motion, or other paper" itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous. . . . In short, the fact that the court concludes that one argument or sub-argument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the

> motion or pleading is frivolous or that the Rule has been violated.

Id. at 1540-41; *see also In re Mooney*, 841 F.2d 1003, 1005 (9th Cir. 1988). These protections apply just as well to a motion for sanctions as to the pleading sought initially to be held sanctionable. Appellees' FRAP 38 motion was at least colorable.

Rehearing should thus be granted and the sanctions reversed.

C. Rehearing Should Be Granted Since Appellees Were Not Properly Notified that a Sanctions Motion Was Pending Against Them.

Perhaps the ultimate irony of the panel disposition is that, after convincing the majority that Partington will have a full chance in state court to raise all defenses before any sanction may be entered against him, Appellees find themselves seeking to overturn a summary sanction that everyone here ought to agree, at least in principle, is wrong. "Sanctions may not be imposed upon a person who is not on notice (a) of the fact that sanctions are under consideration, (b) the reasons why sanctions are under consideration or (c) the type of sanctions under consideration." *ABA Guidelines*, 121 F.R.D. at 127. Here this notice was not, at least not clearly, given in the way contemplated by the federal rules.

Though the opinion on this point is not clear, the record shows that the request for sanctions acted upon in this case was raised in the Reply Brief, and in a Brief Amicus Curiae (filed, despite FRAP 29, two and a half

months after the Opening Brief, and two weeks after the Appellees' Answering Brief was lodged).

FRAP 28(c) is explicit that, after filing of the Reply, "[n]o further briefs may be filed except with leave of court." For this reason, decisions in this circuit are legion that " ' "appellants cannot raise a new issue for the first time in their reply briefs." ' " *Northwest Acceptance Corp. v. Lynwood Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (quoting *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986) (quoting *Thompson v. Commissioner*, 631 F.2d 642, 649 (9th Cir. 1980))). Though subsequent filings, which did not move for sanctions, referred to the requests in the Reply and Amicus Briefs, Appellees had no reason to believe the Court would construe those briefs, particularly that of a non-party without any standing, as motions for affirmative sanctions against them. The Court did not indicate at argument that it was doing so. Partington never made a Rule 27 motion for sanctions, and Appellees never received Rule 27's protections.

For all the foregoing reasons, the Court was never informed of our full defenses, *supra*. *See Tom Growney Equipment, Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 836-37 (9th Cir. 1987).

Appellees do not dispute that there are some cases where the frivolity of a motion is so clear that a summary sanction may be proper. *See ABA Guidelines*, 121 F.R.D. at 127. But this is not such a case, and nothing in the Court's opinion suggests that the Court believes this is such a case. Indeed, in *Meeks* itself, the Court did not require payment of any of appellant's (let alone an amicus's) attorneys fees, but required only forfeiture of costs to

which Appellees would be entitled under FRAP 39. *See* 845 F.2d at 1421. This Court, when acting summarily, has shown restraint, and addressed counsel for both sides without imposing sanctions. *David v. United States*, 820 F.2d 1038, 1044 (9th Cir. 1987).

Because a sanctions award, even a small one, "carries intangible costs," the Courts have recognized that it is improper to "impugn [an attorney's actions] without carefully analyzing the legal and factual sufficiency of the arguments." *FDIC v. Tekfen Construction and Installation Co.*, 844 F.2d 440, 444 (7th Cir. 1988). This logic has special force here, where the Court has not had the benefit of Appellees' full arguments why we should not be summarily sanctioned. *See supra* pp. 5-13.

For these added reasons, rehearing should be granted and the sanctions reversed.

III. CONCLUSION

For the reasons above, rehearing should be granted as to Part V of the opinion and the sanctions against Appellees reversed. In the interest of justice the Appellees unconditionally waive the costs to which they would otherwise be entitled under FRAP 39.

Dated: Honolulu, Hawaii, March 25, 1989.

WARREN PRICE, III
Attorney General
State of Hawaii

/s/ Robert A. Marks
ROBERT A. MARKS
STEVEN S. MICHAELS
Deputy Attorneys General

Counsel for
Defendants-Appellees
Joseph M. Gedan and
Howard T. Chang

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN; HOWARD T. CHANG, Defendants-Appellees.	C.A. NO. 87-2375 D.C. NO. 87-0172-ACK ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

DECLARATION OF SUSAN L. GOCHROS

I, Susan L. Gochros, declare pursuant to 28 U.S.C. § 1746:

1. I served as a Deputy Attorney General from November 1986 until July 1988 and, in that capacity, served as counsel for Appellees Joseph M. Gedan and Howard T. Chang, herein.

2. I am presently a member in good standing of the Bar of this Court and have never, prior to this case, been sanctioned through Rule 11 proceedings by this Court or any other Court.

3. As counsel for Appellee State officials, I assisted in preparing the Answering Brief, dated November 30,

1987 and argued this cause before a panel of this Court on April 8, 1988.

3. At all times during my representation of the Appellees in this case, including the preparation, review and filing of the Answering Brief as well as the oral argument, I made arguments which I believed to be in good faith and at no time did I make arguments for improper purposes, not did I put forth arguments or theories without conviction of the merits of the legal theories upon which such arguments were predicted.

4. At no time during the course of oral argument on this appeal did anything the panel said lead me to believe that either the Appellant's Reply Brief or the Amicus Brief were being construed as a motion for Rule 11 sanctions against Appellees. Although the Court expressed concerns about the language of the briefs, I understood such concerns to be directed to both Appellants and Appellees and at no time did I perceive such concerns to mean that the panel was considering either the Reply Brief or the Amicus Brief as a motion for sanctions against Appellees. Accordingly, Appellees did not understand that a motion was pending, and no defense regarding the request for sanctions was provided at the oral argument.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 24, 1989, at Honolulu, Hawaii.

/s/ Susan L. Gochros
Susan L. Gochros

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN; HOWARD T. CHANG, Defendants-Appellees.	C.A. NO. 87-2375 D.C. NO. 87-0172-ACK ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

DECLARATION OF STEVEN S. MICHAELS

I, Steven S. Michaels, pursuant to 28 U.S.C. § 1746, declare:

1. I have been a Deputy Attorney General since May 5, 1985, and, in that capacity, was substantially responsible for preparing, and in fact signed, the Answering Brief in this appeal, and subsequent filings in this appeal by the Appellees.

2. I am presently a member in good standing of the Bar of this court and have never, prior to this case, been sanctioned through Rule 11 proceedings by this Court or any other Court.

3. As the Court is aware from Mr. Partington's letter of September 2, 1988, a panel of this Court on August 22, 1988, entered an order critical of an opposition to a motion which your declarant filed in a separate appeal. *See Robinson v. Ariyoshi*, 854 F.2d 1189 (9th Cir. 1988). that order did not enter sanctions, and no motion pursuant to the specific invitation in that order has been filed. A Rule

27 motion for sanctions concerning statements made in the Reply Brief in *Robinson*, which invokes the August 22, 1988, order, however, was filed by Appellees in appeal 88-1573 & 88-1679 on February 13, 1989. The motion was opposed and is, as of this writing, pending before the panel in *Robinson*. The motion also invokes statements by the District Court in *Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1021 (D. Haw. 1987), invoking Rule 11, which are, in part, the subject of the *Robinson* appeals. Your declarant requests the Court, before basing any determination here on statements of the judges in the *Robinson* litigation, or the pendency of motions in that litigation, to consider the papers filed in those appeals on February 23, March 7, and March 17, 1989, true copies of which will be made available to Mr. Partington upon his request.

4. At all times during representation of Appellees here, including preparation, review, and filing of the Answering Brief, and later filings, I made arguments I believed to be in good faith and at no time did I make arguments for improper purposes, nor put forth arguments or theories without conviction of the merits of the legal theories upon which such arguments were predicated.

5. At no time during the course of the proceedings did I understand that the references to FRCP 11 in the Reply Brief and Amicus Brief of the Hawaii Criminal Defense Lawyers' Association to be pending motions for Rule 11 sanctions against the Appellees for the making of a request for attorneys' fees on appeal.

6. The basis for this belief was principally your declarant's understanding that the Court would not consider arguments, and especially not affirmative claims for relief, raised for the first time in a Reply Brief, or affirmative claims for relief by an Amicus Curiae, and the lack of any indication from my co-counsel, Ms. Gochros, that the Court at argument indicated it was entertaining the Rule 11 request in the Reply and Amicus Briefs.

7. While filings subsequent to the Reply and Amicus Briefs made reference to the request for sanctions in those briefs, at no time did I understand that a formal motion against Appellees was before the Court, and thus at no time did I file papers presenting Appellees' full opposition to a motion for sanctions.

8. In our letter dated September 5, and our filings of November 23, and 28, 1988, the latter in connection with Appellant's memorandum in support of the motion to supplement the record (which motion was denied), your declarant made objections which he understood as having communicated Appellees' view that a motion for sanctions against them was not before the Court, the court should not entertain such a motion without the notice provided by Rule 27, and that the Court should grant a further chance to be heard on behalf of Appellees if the Court were entertaining granting sanctions against them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 1989, at Honolulu, Hawaii.

/s/ Steven S. Michaels
STEVEN S. MICHAELS

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN; HOWARD T. CHANG, Defendants-Appellees.	C.A. NO. 87-2375 D.C. NO. 87-0172 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

APPELLEES' BRIEF REGARDING REHEARING EN BANC WITH RESPECT TO RULE 11 SANCTIONS FOR CONDUCT DURING APPEAL*

Pursuant to this Court's Order requesting briefs concerning "whether this case should be reheard en banc to consider the availability of Rule 11 sanctions for conduct occurring during appeal," Appellees Rule 13 Special Master Joseph M. Gedan[1] and Prosecutor Howard T. Chang pray that, if the panel is unable to grant our March 27, 1989, Petition for Rehearing, which seeks reversal of the sanctions ordered in Part V of the March 13, 1989, majority opinion, an en banc panel should be convened to

* Covers, tables, addenda, and other material deleted in printing.

[1] "Rule 13" refers to Haw. S. Ct. R. 13, the subject of the underlying litigation in this appeal. *See Partington v. Gedan*, No. 87-2375 (9th Cir. July 12, 1989) ["Second Amended Slip Op."].

review the majority decision's sanctions order against Appellees.

We understand that, if en banc review is granted, the question raised by the Briefing Order would fairly include:

(1) Whether Ninth Circuit Rule 1-1 may or should be interpreted to allow sanctions pursuant to FRCP 11 for conduct on appeal, thus, specifically, whether *In re Curl*, 803 F.2d 1004 (9th Cir. 1986), and its progeny, should be limited or overruled?

(2) If not, whether the panel erred in holding that Rule 11 sanctions were appropriate in this case to punish government appellees who sought to obtain, under, *inter alia*, FRAP 38 and 28 U.S.C. § 1919, their damages on appeal on the grounds that

> (a) Plaintiff's efforts to escape a *Younger* dismissal, see Younger v. Harris, 401 U.S. 37 (1971), were foreclosed by clearly established United States Supreme Court precedent (*e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)), which was available to counsel when Appellant's opening brief on appeal was filed; and
>
> (b) The District Court lacked subject matter jurisdiction over Appellant's premature federal challenge to state court attorney disciplinary proceedings, and "just costs" were available under 28 U.S.C. § 1919, which does not require the action be frivolous?[2]

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[2] Mindful that this brief may not exceed the Court's leave, we have interpreted the question presented to comprise

(Continued on following page)

I. SUMMARY OF PROCEEDINGS.

This case arises out of Honolulu attorney Earle Partington's efforts to obtain federal equitable relief to restrain proceedings pending against him under Hawaii Supreme Court Rule 13 following the Supreme Court of Hawaii's ruling in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985) (C.R. 1), that Partington had been constitutionally ineffective under Hawaii law in acting as trial counsel for Clifford Clarke at Clarke's murder trial in state court. Second Amended Slip Op., *supra* n.1, at 7747. Under Rule 13, Partington was required to submit to

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(Continued from previous page)

" 'every subsidiary question fairly included therein.' " *Pulliam v. Allen*, 466 U.S. 522, 528 n.6 (1984). Thus, we understand the Court to have asked whether the law, "on its face," renders Rule 11 inapplicable to conduct on appeal, and, if not, whether Rule 11 is available for the conduct in *this* appeal. We are aware of the debate within the panel respecting the first sub-issue, but have presented both sub-issues on the view that the panel would wish the *en banc* Court to have the option to decide any sanction issue on the narrow basis that we did not violate Rule 11. *Cf. Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J.).

We understand further, that the panel has not acted on our Petition for rehearing. The Petition, if granted, moots any need for *en banc* review of sanctions issues because we have abandoned any claim for sanctions from Appellant. *See Deakins v. Monoghan*, 108 S. Ct. 523, 528 (1988). In the interest of justice we have waived the costs to which we would be otherwise entitled under FRAP 39. *See* Appellees' Pet. for Rehearing at 1 (Mar. 27, 1989).

proceedings before a Special Master, with a right of appeal to the Hawaii Supreme Court, "to determine whether action against the counsel alleged to have been incompetent is warranted." *Id.* at 7750.

A Rule 13 Special Master (Appellee Gedan) was appointed on February 3, 1986, and a Rule 13 Prosecutor (Appellee Chang) was appointed on August 13, 1986. Partington filed this action in the federal District Court on March 9, 1987, *id.* at 7751, and the court below, on July 6, 1987, dismissed the action pursuant to the *Younger* doctrine, citing *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982). *See id.* at 7752.

On March 13, 1989, this Court affirmed the dismissal in an opinion by Judge Wallace. The Court held that any claims that *Younger* did not apply because of the lack of adequate opportunities to litigate constitutional claims in the Rule 13 proceedings were unmeritorious in light of *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), which required Partington to show " 'that state procedural law bar[s] presentation of [his] [underlying federal] claims.' " *Id.* at 15, *quoted*, Second Am. Slip Op. at 7759, 7764.

The panel majority rejected arguments (which were not even pressed by Partington) that the "bad faith" and "extraordinary circumstances" exception to *Younger* dismissal had been demonstrated (*id.* at 7768-69). The majority also held that any challenge to the decision in *State v. Clarke* itself was waived and arguably barred on jurisdictional grounds. *See id.* at 7770-72. Judge Reinhardt dissented from the panel majority's analysis of the *Younger* doctrine (*id.* at 7774-7803); Judge Noonan joined in Judge Wallace's opinion and filed a concurrence (*id.* at 7803-10).

In their Answering Brief, appellees prayed that "costs and attorneys fees on appeal should be awarded." Ans. Br. at 3, 45; Given appellant's total failure to present his federal attacks on the Rule 13 process in the Rule 13 proceeding itself, appellees' main argument for sanctions was that *Middlesex* and *Pennzoil* completely controlled any asserted basis for reversal:

> The central point here is that this Court has repeatedly recognized that *Younger* bars just such attacks on bar disciplinary proceedings, *e.g. Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983); *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 469 (9th Cir. 1984); *Polykoff v. Collins*, 816 F.2d 1326, 1333 (9th Cir. 1987). The manner in which Partington sought to distinguish this case from *Middlesex* simply ignores the manner in which state procedural law is to be construed in light of *Pennzoil*, or simply elevates constitutional interests to a level that *Younger* squarely rejected more than fifteen years ago. Just as under *Anderson* [*v. Creighton*, 483 U.S. 635 (1987) (governing qualified immunity under 42 U.S.C. § 1983)] it should not be necessary for the identical challenge brought here to have been rejected by this court for attorneys fees to be awarded on appeal.

Ans. Br. at 44.

Appellees also argued as an alternative basis for affirmance and for attorneys fees that Partington's claims were not ripe, and beyond the Court's jurisdiction. *See id.* at 2, 20, 39, 40. We sought attorneys fees under 28 U.S.C. § 1919. Ans. Br. 3, 45.

In Appellant's Reply, and in an Amicus Brief filed, despite FRAP 29, two and a half months after the Opening Brief, Partington and the Hawaii Criminal Defense

Lawyers Association sought sanctions against Appellees under FRCP 11 based on Appellees' Rule 38 motion. No motion for sanctions was ever filed pursuant to FRAP 27. No order to show cause issued. No right to file a further brief was allowed, *see* FRAP 28(c), and no indication was given by the Court at argument that it was entertaining a Rule 11 request. *See* Decl. of Susan Gochros at ¶ 4 (Mar. 27, 1989).[3]

In its original decision, rendered March 13, 1989, the Court granted Rule 11 sanctions against Appellees. The Court appeared to do so on the basis of selected parts of the Answering Brief challenging, as frivolous, Partington's underlying claims, parts which were not fully reflective of the argument,[4] and which were the basis

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[3] Appellees, in response to letters and other papers (which did not themselves seek sanctions), filed after argument, took the view that a motion for sanctions against them was not before the Court. *See* Decl. of Steven S. Michaels a' ¶ 8 (Mar. 27, 1989).

[4] Thus, for example, although the general heading for Part "B" of the Answering Brief stated "Each of Partington's Substantive Claims is Frivolous," the term "frivolous" was omitted from the subheadings and text of those parts of the "Argument" section relating to Partington's procedural due process, First Amendment, and Equal Protection claims. *See* Ans. Br. at 39, 40, 42. Appellees never denied Partington had – and has – substantial procedural due process rights; rather, our principal defense to procedural claims was – and is – that Partington had not been "deprived" of anything without due process. *See* Ans. Br. 25-38. In short, the thrust of our brief was that Partington's claims ignored the generous features of state procedural law that would protect Partington in any Rule 13 case. *Id.* at at [sic] 19, 25-38.

neither for Appellees' Rule 38 request, nor for our request for attorneys fees pursuant to 28 U.S.C. § 1919. *See* Second Am. Slip Op. at 7774. The Court found, despite *Pennzoil*, that "Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent," *id.* at 7773, and our motion was frivolous (*id.* at 7773-74). Citing *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421 (7th Cir. 1988), which denied a prevailing Appellee its taxable costs, the Court granted Partington and HCDL fees incurred in resisting our motion.

On March 27, 1989, Appellees filed a petition for rehearing seeking reversal of the sanctions. Partington then filed a petition seeking rehearing and *en banc* review. On July 12, 1989, the Court denied Partington's rehearing request, but did not act on Appellees' FRAP 40 Petition or Partington's FRAP 35 suggestion.

II. REASONS WARRANTING EN BANC REVIEW

In seeking rehearing in March of this year, we believe that the law of this and other Circuits, as applied to this case, so clearly warranted correction of the sanctions against us that *en banc* review was unnecessary. If the panel, however, is unable to grant our Petition, it is well within the *en banc* Court's power under FRAP 35(a) to hear, and reverse, the sanctions award.

The factors motivating exercise of that authority are forcefully present in this case. Not only is it doubtful (as Judge Reinhardt suggests) that Rule 11 should be applicable at all to our Rule 38 request; as shown by our Petition

for Rehearing, and summarized below, the panel judgment holding that Rule 11 was violated by our Rule 38 request constitutes an implicit attack on nearly two centuries of substantive constitutional law governing the circumstances in which ambiguous statutes may be drawn in question on federal grounds, and is flatly contrary to the established jurisprudence of Rule 11 in this and other circuits.

Without reversal of the panel decision, *Partington v. Gedan* will stand as an invitation to continued collateral litigation of the sort here, which has sidetracked important state proceedings for over two years despite controlling Supreme Court precedent.

A. En Banc Review Should Be Granted Because the Unrestricted Availability of Rule 11 Sanctions in this Court is Contrary to the Practice in Other Circuits and is Not Clearly Authorized in the Local Rules of this Circuit.

While both sides have invoked Rule 11 as a basis for sanctioning the other for its conduct on appeal, the panel Order and the amended panel opinions identify a lurking threshold issued that merits en banc review; whether Rule 11's remedies are available for any conduct on appeal regardless whether sanctions are proper under other authority.[5]

Because of the differing standards that apply to a motion for Rule 11 sanctions – particularly those invoking the duty of "reasonable inquiry," *see Zalidvar v. City of*

[5] *See Roadway Express v. Piper*, 447 U.S. 752, 764-67 (1980).

Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986) – this issue is not academic. Under the remedial structure contemplated by Judge Reinhardt, an appellant would be subject to Rule 38, which allows sanctions " 'when the result is obvious or the appellant's arguments of error are wholly without merit,' " *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1508 (9th Cir. 1986), a standard equivalent to that under Rule 11. *See Zaldivar, supra*, 780 F.2d at 831 & n.7. As to "motions, or other papers," Judge Reinhardt would rely on the court's inherent power, FRAP 46, and 28 U.S.C. § 1927. By contrast, under the rules articulated by the panel majority, all conduct on appeal involving this signing of a "pleading, motion, or other paper" would be amenable to Rule 11's expanded authority.

The issue here is whether this Court should encourage what would be the appellate analogue to the "Rule 11 drafters' nightmare," *see Roberts v. Peat, Marwick, Mitchell*, 857 F.2d 646, 654 (9th Cir. 1988): cases where a motion for sanctions begets a motion for sanctions for the first motion, "repeating itself to infinity." *Evitts v. Lucey*, 469 U.S. 387, 411 (1985) (dis. op.). Insofar as " '[f]riviolity, like obscenity, is often difficult to define,' " *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987) (en banc), there is a strong claim that opening sanctions requests on appeal to Rule 11 "is not worth the candle." Second Amended Slip Op. at 7802. As Judge Reinhardt suggests, on appeal application of Rule 11 standards ought to begin, and end, with analysis of whether the appeal itself met the objective test.[6]

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[6] The scheme envisioned by Judge Reinhardt, moreover, takes account of differences between trial and appellate

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More important, Rule 11 sanctions for conduct on appeal are not clearly authorized under FRAP and this Court's local rules. Section 2071 of Title 28 "requires that local rules . . . 'shall be consistent with' the 'rules of practice and procedure prescribed by the Supreme Court.' " *Frazier v. Heebe*, 482 U.S. 641, 646 (1987). It is not clear the Court intended the remedies authorized by FRAP 38 and 46 to be open to supplementation by a local rule incorporating FRCP 11 on appeal. The 1983 advisory committee notes state Rule 11 was intended to foster "[g]reater attention by the *district courts* to pleading and motion abuses" (emphasis added), and, at least three Circuits have clearly held that Rule 11 does not apply conduct solely on appeal.[7] Decisions elsewhere[8] are

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litigation. For example, here the motion targeted by the Rule 11 request, *i.e.*, a motion for sanctions – is not a "shot in the dark" because the moving party has the benefit of a judgment in its favor, one which will aid assessment that an appeals court may grant the motion prayed for. The existence of trial proceedings, where an Article III judge has rendered written rulings, is a check on abuse not always available in the District Court.

[7] *See* Second Amended Slip Op. at 7801-02 (Reinhardt, J., dissenting in part and concurring in the judgment in part) (citing *Leigh v. Engle*, 858 F.2d 361, 370 n.5 (7th Cir. 1988)); *see also Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988); *Braley v. Campbell*, 832 F.2d 1504, 1510 n.4 (10th Cir. 1987) (en banc).

[8] *See Coughlan v. Starkey*, 852 F.2d 806, 817 n.21 (5th Cir. 1988) (by circuit rule FRCP 11 applies solely to petitions for en banc review); *cf. Hedison Mfg. Co. v. NLRB*, 643 F.2d 32 (1st Cir. 1981) (mentioning FRCP but relying on FRAP 38); *United States v. Carley*,783 F.2d 341 (2d Cir.), *cert. denied*, 476 U.S. 1142 (1986) (FRCP 11 invoked to allow recovery of fees in the District Court, also invoking 28 U.S.C. § 1927 on appeal).

ambiguous, and it appears judges have "read into Rule 11 sanctioning power that the Rule does not confer." *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 105 (1988).

Panels in this Circuit nonetheless have interpreted Circuit Rule 1-1, and its predecessor, which provide that "[t]he Federal Rules of Civil Procedure, . . . whenever relevant, are adopted as part of the rules of this court," as incorporating Rule 11 for appellate proceedings. *See In re Mooney*, 841 F.2d 1003 (9th Cir. 1988) (Hug, Nelson, and Noonan, JJ.); *In re Boucher*, 837 F.2d 869 (9th Cir. 1988) (Hall, Noonan, and Thompson, JJ.); *Rockwell International Credit Corporation v. United States Aircraft Insurance Group*, 823 F.2d 302 (9th Cir. 1987) (Hall, Noonan, and Thompson, JJ.); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986) (Nelson, Canby, and Noonan, JJ.). None of the opinions in these cases, however, discuss a logical rationale by which the "whenever relevant" language incorporates a civil rule or not. As Judge Reinhardt suggests, absent a persuasive interpretive theory, the Court's analysis is entirely circular. *See also Fong v. James W. Glover, Ltd.*, 197 F.2d 710, 711 (9th Cir. 1952) (rule incorporating FRCP "whenever applicable" does so if FRCP was "capable of being applied"). No reason for the conflict with the Sixth, Seventh, and Tenth Circuits presently exists.

Although such a conflict might well be justified on the basis of other principles found in this Court's decisions, in fact the expansion of Rule 11 to all filings on appeal is inconsistent with this Court's concerns that Rule 11 has led to "the overlitigation of sanctions questions." *Townsend v. Holman Consulting Corporation*, 881 F.2d 788 (9th Cir. Aug. 7, 1989); *see Greenberg v. Sala*, 822

F.2d 822, 887 (9th Cir. 1987); *Golden Eagle Distributing v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986); *Zaldivar v. Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986).

In short, although it is apparent that the Rule 11 sanctions against Appellees must be reversed, it would be fully proper to submit this case for en banc review to determine whether Rule 11 is applicable to filings on appeal. *Cf. Greenhow v. Secretary of Health & Human Services*, 863 F.2d 633, 636 (9th Cir. 1988).

B. En Banc Review Should Be Granted Because the Application of Rule 11 to Appellees' Motion for Rule 38 Sanctions is Wholly Unprecedented, Ignores Controlling Substantive Law, and is in in [sic] Sharp Conflict With Accepted Rule 11 Jurisprudence.

Even if Rule 11 *were* the standard against which our motion for attorneys fees on appeal had to be measured, en banc review would be fully warranted to correct the panel's unprecedented punishment of a request for damages on appeal, when, in fact, a single issue – here the *Younger* doctrine – obliterated Partington's appeal "at a stroke," and, what's more, did so on the basis of controlling Supreme Court precedent governing each stage of the analysis. As we wrote in our Petition for Rehearing:

> There is no, nor should there be, protection for "baseless litigation.". . . .The sanctions rules are no less susceptible to abuse than other grounds for relief. When they are abused, the Court should act to deter such abuse.
>
> The Department and Appellees submit, however, that this is simply the wrong case in which to apply a *Meeks* sanction. The Rule 38

request here was not a "knee-jerk" reaction. *See DeWitt v. Western Pacific Railway Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). It was a considered motion based on our view, with which the majority agreed, that abstention under the *Younger* doctrine was required because the Hawaii Rule 13 scheme under review was "strikingly similar" to that in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 432 (1982). *See* Slip op. at 2174-75 (comparing *Middlesex*). It was also based on our view, with which the panel also agreed, that any colorable issue under *Middlesex* was resolved by the heavy burden imposed on Partington by *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), of having to show procedural inhospitality in the state courts by "unambiguous authority" – a burden the majority found Partington failed to carry. Slip op. at 2177, 2178, 2182 (citing *Pennzoil*). Our effort to extend *Pennzoil* so the panel would find Partington's arguments frivolous has not prevailed, but this does not make our request frivolous. Pet. for Reh. 2-3.

We also demonstrated that the Court had misperceived our sanctions motion, including our request for counsel fees under the "just costs" statute, 28 U.S.C. § 1919 (1982) (Pet. for Reh. at 5-8), misunderstood the strength of our motion in light of caselaw barring inferences of procedural inhospitality in the state courts (*id.* at 9-13), and failed to appreciate that no motion for sanctions had ever been filed against us, and that *sua sponte* sanctions were improper in this case (*id.* at 13-15). If the panel cannot agree to reverse the sanctions here, the full Court should grant en banc review and reverse the sanctions.

Appellees' motion for sanctions simply did not violate Rule 11. Our motion for Rule 38 sanctions was based

on the fact that Mr. Partington's appeal was controlled by *Younger* abstention, particularly by the rulings in *Middlesex* and *Pennzoil*. *See supra* p. 4. Though the majority here observed that "Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent," Second Am. Slip Op. at 7773, this observation fails to recognize that *Pennzoil*, too, is entitled to obedience. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). The opening brief, for reasons that have never been explained, did not even cite *Pennzoil*, and, in moving for Rule 38 fees, Appellees simply invoked the uncontroversial notion that "[c]ounsel who are admitted to practice in a federal court take on themselves the obligation to know the relevant law." *In re Mooney*, 841 F.2d 1003, 1006 (9th Cir. 1988).

Indeed, Partington's arguments for evading *Pennzoil* were, in an important sense, at odds with extensive precedent, for they all depended on reading various features of Hawaii law so as to generate a federal case that did not, at this stage, exist. Partington's arguments thus violated "the well-established principle that statutes will be interpreted to avoid constitutional difficulties," *Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988), a "cardinal principle [that] . . . has for so long been applied by this Court that it is beyond debate." *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 108 S. Ct. 1392 (1988), *Id.* at 1397. The basic precept of the law of FRAP 38 is that a lawyer is not free to challenge principles that are "beyond debate." *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1508 (9th Cir. 1986).

Partington's appeal to this Court was based fundamentally on just such challenges. *See, e.g.*, Second Amended Slip Op. at 7757 (unfounded claim that attorney/client privilege law of Hawaii is a bar in Rule 13); *id.* at 7763 (unfounded claim that *State v. Clarke* has preclusive effect); *id.* at 7767 (unfounded claim that state recusal law is not available to him).

Indeed, insofar as Partington suggested that the judges in the state court system were biased, *id.* at 7765, a motion for sanctions was appropriate under an extensive array of precedent:

> Totally without merit . . . is the company's argument that the administrative law judge should have disqualified himself for bias because he ruled against the company on certain discovery matters. Indeed, the argument is frivolous. Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it "in" for the party for reasons unrelated to the officer's view of the law, erroneous as that view might be.

McLaughlin v. Union Oil of California, 869 F.2d 1039, 1047 (7th Cir. 1989). Indeed, no one, prior to this appeal, ought to have known better than Mr. Partington the rigorous standards applied to a challenge to a judge's fairness. *See Maier v. Orr*, 758 F.2d 1578, 183 (Fed. Cir. 1985) (where appellant participated at least in part in motion for recusal condemned as "precipitous" and "reckless"); *see also Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988); *INVST v. Chem-Nuclear Sys.*, 815 F.2d 391, 402-03 (6th Cir. 1987). Indeed, Partington's wholly premature effort to use 42 U.S.C. § 1983 to effect a federal preemptive recusal order was the very sort of "sweeping" request that the

Supreme Court has condemned as "invert[ing] traditional abstention reasoning." *Moore v. Sims*, 442 U.S. 415, 442 (1979).

That Partington might have had colorable underlying federal claims does not control whether our sanctions motion was frivolous. Even litigants with good claims may incur sanctions because of a time bar, jurisdictional impediment, or a prior judgment. *See ABA Guidelines*, 121 F.R.D. at 119-20 (citing cases from five circuits). Our efforts to extend this reasoning to include attempts to escape *Younger* did not prevail, but were not frivolous. *Cf. Davis v. Crush*, 862 F.2d 84 (6th Cir. 1988) (sanctions for ignoring *Younger* sustained in the District Court, reversed on appeal solely because no state proceeding pending).

It is likewise irrelevant that the Court may disagree with our assessment of Partington's underlying federal claims. Under Rule 11, our strong characterization of those claims was not sanctionable. The Court must evaluate "the objective reasonableness of [our] entire [motion,]" *Townsend v. Holman Consulting Corp.*, 881 F.2d 788 (9th Cir. Aug. 7, 1989), and may neither " 'sanction for the level of assurance used by the brief-writer,' " *Golden Eagle*, 801 F.2d at 1540, nor "blur the roles of attorneys and judges over the proper reading of legal precedent," *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987). In fact, in addition to seeking fees because the appeal was controlled by Supreme Court precedent, Appellees moved to obtain fees because the case ought to have been dismissed for want of Article III jurisdiction, and fees were available without a finding that the appeal was frivolous. *See Schultz v. National Coalition of Hispanic Mental Health and Human Services Orgs.*, 678 F. Supp. 936, 939 (D.D.C.

1987) (fees granted under 28 U.S.C. §§ 1447 & 1919). This alternative prayer, alone, ought to have insulated our motion from Rule 11 sanctions. *See Townsend v. Holman Consulting Corp.*, 881 F.2d at ___. Finally, for all practical purposes, the sanctions here were granted *sua sponte*, *cf. Northwest Acceptance Corp. v. Lynwood Equipment Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (argument raised for first time in reply not before the court). Although the entry of sanctions, *sua sponte*, may on occasion be proper, *see Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987), the majority's misapprehension of our motion and its justification shows that this is not so here. *See Tom Growney Equipment, Inc. v. Shelley Irrig, Dec., Inc.*, 834 F.2d 833, 836-37 (9th Cir. 1987) For all these reasons, the Court should grant en banc review.

III. CONCLUSION

For the reasons stated in our Petition for Rehearing, rehearing as to Part V of the opinion should be granted and the sanctions against Appellees reversed. If the panel is unable to grant such relief, the Court should hear the case en banc and, on such review, reverse the sanctions against the Appellees.

Dated: Honolulu, Hawaii, September 12, 1989.

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(2)

No. 89-1506

Supreme Court, U.S.
FILED
JUN 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term 1989

JOSEPH M. GEDAN, et al.,

Petitioners,

v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PARTINGTON'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a request for sanctions for taking a frivolous appeal is itself frivolous when the arguments supporting the appeal, although not ultimately successful, are far from frivolous and are even excellent?

2. Whether a judgment by a court of appeals sanctioning appellees for a frivolous request for sanctions for an allegedly frivolous appeal was well founded in law when the opinion cited Fed. R. App. P. 11, as incorporated by the court of appeals into its rules, as the source of its power to impose such sanctions?

3. Whether appellees upon whom sanctions are imposed for filing a frivolous request are afforded due process when (a) notice that sanctions will be considered is provided by way of requests for such sanctions in the reply brief and an *amicus* brief, (b) appellees decline to request additional briefing on the issue, and (c) a hearing on all issues in the case is held?

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No. 89-1506

In The

Supreme Court of the United States

October Term 1989

JOSEPH M. GEDAN, et al.,

Petitioners,

v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PARTINGTON'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Earle A. Partington respectfully requests that the petition for a writ of certiorari in No. 89-1506 be denied. In No. 89-1506, Petitioners Joseph M. Gedan and Howard T. Chang seek review of the judgment of the United States Court of Appeals for the Ninth Circuit sanctioning them for their frivolous request for sanctions for an allegedly frivolous appeals taken by Partington. The points raised by Gedan and Chang are of little note

and certainly fail to raise special or important reasons under Supreme Court Rule 10.1 for the writ to be granted.

STATEMENT OF THE CASE

On March 9, 1987, Respondent Partington filed suit in the United States District Court for the District of Hawaii under 42 U.S.C. §1983 against Petitioners Gedan and Chang to prevent them from conducting an attorney disciplinary proceeding against Partington in deprivation of his rights under the United States Constitution, including the right to free speech, guarantees of due process and equal protection, and the right to counsel, under the First, Fifth, Sixth, and Fourteenth Amendments. A2,[1] A8-9; *Partington v. Gedan*, 880 F.2d 116, 117, 119 (9th Cir. 1989) (the opinion below). The Ninth Circuit's description of the attorney disciplinary proceeding and the underlying case (namely, *State v. Clarke*, Haw. S. Ct. No. 10041) is printed in the Appendix to Petitioners' Brief. *See* A2-9; 880 F.2d at 117-20.

On July 1, 1987, in response to a motion filed by the Hawaii Association of Criminal Defense Lawyers (HACDL), which is a Respondent here, the district court granted HACDL permission to file a brief as *amicus curiae;* at the same time, the district court dismissed Partington's complaint the ground of abstention under

[1] The abbreviation "A" followed by a page number is used to refer to a particular page of the Appendix to the Petition for Certiorari. (The same notation was used by Petitioners.)

Younger v. Harris, 401 U.S. 37 (1971), as applied in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). A9; 880 F.2d at 120.

Respondent Partington appealed to the Ninth Circuit and filed his opening brief. *See* A97-147. Petitioners Gedan and Chang, in their answering brief, requested that sanctions be imposed against Partington pursuant to Rule 11 of the Federal Rules of Civil Procedure (FRCP), Rule 38 of the Federal Rules of Appellate Procedure (FRAP), or various statutory provisions. A149-50, A150-51, A167, A188-89. Stating that the "objective good faith" standard of Rule 11 applied to arguments "made on appeal" (citing *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1583 (9th Cir. 1987)), Gedan and Chang argued for Rule 11 sanctions because it was "apparent" that Partington's appeal was "meritless." A189.

On the reply brief, Partington contested Petitioners' claim that "each and every issue raised by him [was] utterly without merit," A191, and requested the imposition of Rule 11 sanctions against Gedan and Chang. A192. On the *amicus curiae* brief, HACDL pointed to the "chilling effect on constitutional rights" of unwarranted sanctions in cases such as this one; HACDL expressed approval of the sanctions against Gedan and Chang as requested by Partington and asked for sanctions on its own behalf as well. A214-15.

The arguments on the merits, as raised by Partington and HACDL, were later unanimously characterized as "excellent, although not ultimately meritorious" by the Ninth Circuit (A37, A38, A81; 880 F.2d at 131, 148), which

affirmed the district court's judgment but sanctioned Petitioners Gedan and Chang for requesting sanctions against Partington for taking an allegedly frivolous appeal. A35-38; 880 F.2d at 130-31. Judge Reinhardt dissented on the merits and would have decided in favor of Respondent Partington. A81; 880 F.2d at 148.

REASONS FOR DENYING THE WRIT

A. It was highly appropriate for the court of appeals to sanction Petitioners for their request for sanctions for the allegedly frivolous appeal taken by Respondent Partington, because an appeal based on "excellent" arguments is, by any objective standard, discernable from a frivolous appeal.

Gedan and Chang argue that their request to the court of appeals for sanctions against Partington for taking an allegedly frivolous appeal was "at least colorable" or "at least arguable" because they had argued that *Younger* abstention, particularly as applied in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), made the result of the appeal "beyond debate." P18-19.[2] Gedan and Chang further argue that if *Younger* abstention did not apply, "colorable arguments *could* be made that, [Partington's constitutional] arguments were plainly disposed of by controlling precedent." P20 n.8 (emphasis added).

Their argument is indistinguishable from a statement that they believed their arguments would prevail. The

[2] The abbreviation "P" followed by a page number is used to refer to a particular page of the Petition for Certiorari.

standard for judging a request for sanctions for frivolity, however, is not whether the request was "colorable" or whether they believed they would prevail. As Gedan and Chang pointed out below (in their reply brief in the Ninth Circuit), the standard for imposing sanctions on appeal is the "objective good faith" standard of Rule 11. A189.

On the appeal, the close questions involved exceptions to *Younger* abstention principles and the application of those principles in *Middlesex*: should *Middlesex*, which also involved attorney disciplinary proceedings, be distinguished from the instant case, or should *Middlesex* be considered dispositive? Was the state tribunal biased on the merits of the proceeding? Had it prejudged the case? In particular, did the tribunal meet the impartiality requirement of *Withrow v. Larkin*, 421 U.S. 35 (1975)? Was an adequate opportunity available to raise constitutional challenges? Did extraordinary circumstances foreclose *Younger* abstention? *Cf.* A21-35, 880 F.2d at 124-30 (majority op.) *with* A51-81, 880 F.2d at 136-48 (Reinhardt, J., dissenting). As Partington argued in his opening brief in the Ninth Circuit, *see* A127-33, and as the dissenting judge correctly pointed out, *Withrow* foreclosed *Younger* abstention because a favorable second decision by the same tribunal in Partington's case would constitute an implicit admission that its first decision was erroneous. A66-67, 880 F.2d at 142-43 (Reinhardt, J., dissenting).

Gedan and Chang would ignore these questions and rely on *Pennzoil*, even though *Pennzoil* presented "an unusual fact situation," 481 U.S. at 17, involving as it did the applicability of *Younger* abstention to Texas bond and lien provisions in postjudgment collection procedures, particularly in light of the "open courts" provision of the

Texas Constitution, *id.* at 15, and not involving any situation remotely similar to attorney disciplinary procedures. By any objective measure, it is frivolous to ignore the close questions raised on appeal and to contend that the arguments were utterly without merit.

This view is confirmed by the Ninth Circuit, which unanimously determined that "[f]ar from being frivolous, Partington's and [HACDL's] arguments that *Middlesex* did not compel abstention were *excellent*, although not ultimately meritorious." A37, A38, A81; 880 F.2d at 131, 148. Judge Reinhardt was persuaded that *Middlesex* did not compel abstention; stating that "*Younger* abstention is inappropriate [here]," he would have reversed the district court and decided in favor of appellant. A81; 880 F.2d at 148 (Reinhardt, J., dissenting). The panel was, therefore, in unanimous agreement that Respondents' arguments were excellent and far from frivolous.

By any objective standard, attorneys should be able to distinguish an appeal based on excellent arguments from a frivolous appeal, for the two are nearly at opposite ends of the spectrum. Gedan and Chang disregarded their duty to determine whether their claim of frivolity was well founded. Sanctions against them were, therefore, appropriately imposed.

B. The Ninth Circuit's judgment sanctioning Petitioners for a frivolous request is consonant with the court's power and is harmonious with decisions in other circuits; that the opinion relied on the Ninth Circuit's incorporation of Fed. R. Civ. P. 11 is irrelevant.

In its decision below, the Ninth Circuit stated that it has "power to sanction [Petitioners] pursuant to Rule 11

[of the Federal Rules of Civil Procedure as incorporated in the Ninth Circuit Rules]." A35; 880 F.2d at 130 (citing *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir. 1988); *Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302, 304-05 (9th Cir. 1987); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986)).

Gedan and Chang argue, contrary to the position they took below,[3] that Rule 11 does not support the imposition of sanctions against them because the Ninth Circuit's incorporation of Rule 11 "creates a palpable inter-circuit conflict" with other circuits that do not use Rule 11. P22. The argument elevates form over substance. Other circuits agree with the Ninth Circuit that they have power to sanction frivolous requests for sanctions; the *decisions* are harmonious, even though the bases for arriving at the decisions may be different. *See Meeks v. Jewel Co.*, 845 F.2d 1421, 1422 (7th Cir. 1987) (imposing

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[3] When Gedan and Chang requested that the Ninth Circuit sanction Partington for taking an allegedly frivolous appeal, they relied primarily on Rule 11 (*see* A189), although they suggested other possible bases as well (*see* A149-50, A150-51, A167).

Their reliance below on Rule 11 is nowhere mentioned in their petition for certiorari here. Gedan and Chang repetitively cite Rule 38, FRAP, as the basis for their request below and sometimes note that they relied on other – unspecified – authorities. P5 (made their request "under Fed. R. App. P. 38, and other authority"); P14 (moved for attorneys' fees and costs "pursuant to, *inter alia*, Fed. R. App. P. 38"); P18 (seeking their rule 38 damages below"); P19 (their "request for Rule 38 sanctions"); P20 ("Petitioners' Rule 38 motion").

sanctions on appellee for frivolous request for Rule 38 sanctions); *Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir. 1987) (criticizing appellees' request for sanctions when it "border[ed] on the frivolous," and stating that the court will impose penalties for frivolous request for sanctions).

Further, the Ninth Circuit, unlike other circuits, has adopted the Federal Rules of Civil Procedure, "whenever relevant, as part of the rules of [the] court." *Rockwell*, 823 F.2d at 304; *Curl*, 803 F.2d at 1007; Ninth Circuit Rule 1-1 (former Ninth Circuit Rule 5). The Ninth Circuit has thus incorporated Rule 11 of the Federal Rules of Civil Procedure into its own rules. *Mooney*, 841 F.2d at 1005 (citing *Curl*, 803 F.2d at 1007). Gedan and Chang suggest that it is not "clear" that the Ninth Circuit Rules incorporate Rule 11 (despite *Curl*, *Mooney*, and *Partington v. Gedan*) and then point out that the rules adopted by the courts of appeals must be "consistent" with Supreme Court Rules P23. The implicit suggestion of some inconsistency, without a word of explanation, is not worthy of response.[4]

It is unnecessary, however to decide which rule or which other authority forms the correct basis for the Ninth Circuit's judgment imposing sanctions on Gedan and Chang, because this Court "reviews judgments, not

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[4] As a subsidiary claim (left undeveloped in the argument section of their brief), Gedan and Chang state that imposing Rule 11 sanctions against them "upsets the framework under which sanctions against *appellee* parties are to be judged[.]" P17 (emphasis added). Why appellees who burden the court with frivolous requests should be entitled to preferential treatment under Rule 11 is left unexplained.

opinions," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and "may affirm on any ground that the law and record permit[.]" *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). This Court "recognize[s] the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). Accordingly, the judgment sanctioning Gedan and Chang was well founded in law.

C. Petitioners were afforded due process as to the imposition of sanctions, for Petitioners were provided notice and an opportunity to be heard before sanctions were imposed.

Gedan and Chang allege deprivation of due process in that notice was provided, "if at all, for the first time in the Reply and Amicus Briefs,[5] to which no response is allowed under Fed. R. App. P. 28(c)[.]" P24. They mention the right to " 'some kind of hearing *before* [being deprived] liberty or property.' " P23 (quoting *Zinermon v. Burch*, 58 U.S.L.W. 4223, 4227-28 (U.S. Feb. 27, 1990)). Whether they intend to suggest they were denied such a hearing is unclear.

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[5] Partington and HACDL wonder why Gedan and Chang complain of receiving notice "for the first time" when the reply and amicus briefs were filed, their request for sanctions having been made in the answering brief. Should sanctions against Gedan and Chang have been requested for frivolous conduct *before* the conduct occurred? One is reminded of the White Queen, who screamed and shouted before she pricked her finger with her brooch. *See* Lewis Carroll, Alice in Wonderland and Through the Looking Glass, at 219-20 (Grosset & Dunlap 1948).

Notice to all parties that sanctions would be considered occurred as follows: In the answering brief in the court of appeals below, Gedan and Chang requested sanctions against Partington for having taken an allegedly frivolous appeal. A189, A149-50, A150-51, A167-68. In reply, Partington requested sanctions against Gedan and Chang for their frivolous claim that he had taken a frivolous appeal. A191-92. In the *amicus* brief, HACDL supported Partington's request and entered its own request for sanctions against Gedan and Chang. A214-15. All parties were, therefore, on equal – and sufficient – notice that sanctions against any and all parties would be considered by the court.

The claim that rule 28(c), FRAP, foreclosed Gedan and Chang from an opportunity to be heard is without merit. Gedan and Chang declined even to request additional briefing on the issue of sanctions, and they further declined to address the issue in the hearing that was held – which was a hearing on all issues in the case *before* the sanctions were imposed. Opportunities to be heard were available. Gedan and Chang chose not to take advantage of their opportunities.

The question of how much process is due depends on three considerations: (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest under the procedures used and the probable value of additional procedural safeguards, and (3) the government's interest, including the burdens imposed by the additional safeguards, *Zinermon v. Burch*, 58 U.S.L.W. at 4227 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Gedan and Chang believe they are entitled to extraordinary due process (as to the sanctions) while Partington is entitled to none (as to his underlying claims). *Zinermon* and *Mathews* would have it otherwise. Partington's interest is to be protected from the severe and irreparable damage here to his professional reputation and livelihood, for which there is no state remedy[6] to undo the wrong against him from the erroneous adjudication of ineffectiveness. In contrast, Gedan and Chang's interest is a few thousand dollars, which can be returned to them in the event that the award of sanctions should be reversed (and incidentally is a small fraction of the amount Partington must pay to defend his interests and recover his professional reputation).

For Partington, the Hawaii Supreme Court's final adjudication that he had provided ineffective assistance of counsel came in the face of the following: the client never accused Partington of ineffectiveness, the client never waived the attorney-client privilege, the issue of ineffectiveness was neither raised nor briefed by any party, the Hawaii Supreme Court was not (for it could not have been) privy to attorney-client communications, and neither notice not opportunity to defend was allowed. *See* A99-100 Consequently, there was a grave risk of Partington being erroneously deprived of constitutional rights. In stark contrast, for Gedan and Chang, the risk of

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[6] The most favorable result to Partington in the pending disciplinary proceeding initiated by the Hawaii Supreme Court against him in *State v. Clarke* would be Gedan's dismissal of the proceeding, which would leave the ineffectiveness finding intact and the sixth amendment right to counsel in shambles.

an erroneous deprivation was truly minuscule because the parties had presented their arguments for sanctions, because Gedan and Chang were afforded notice and an opportunity to be heard, and particularly because the Ninth Circuit, like other courts of appeals, is well versed in recognizing frivolous requests. Additional procedural safeguards for Gedan and Chang "would not have improved the accuracy of the [panel's] decision [to impose sanctions]." *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 525 (1983). The courts are already burdened with "the task of reading, analyzing, and judging . . . baseless arguments." *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986). The courts of appeals deplore "the frequency with which lawyers . . . are including in their briefs groundless requests for Rule 38 sanctions" and the attitude that "it can't hurt to ask." A37; 880 F.2d at 130 (quoting *Meeks v. Jewel Co.*, 845 F.2d 1421, 1422 (7th Cir. 1987) (per curiam)). Additional procedural safeguards for Gedan and Chang or others who are sanctioned for frivolous requests would "increase the burden on the court even further." *Miranda*, 710 F.2d at 525.

Gedan and Chang were, therefore, entitled to minimal due process. The due process they received was more than sufficient, for they were afforded notice and opportunity to be heard, and a predeprivation hearing was held even though it was not required. No denial of due process can fairly be claimed in this case.

CONCLUSION

Gedan and Chang fail to show any "special and important reasons" for granting the writ as required under Supreme Court Rule 10.1. Subsection (a) of the rule is inapplicable because the Ninth Circuit's decision below is consistent with decisions in other circuits, even though other circuits have not adopted the Federal Rules of Civil Procedure. Subsection (b) of the rule, which relates to state court decisions, is plainly inapplicable here. And subsection (c) is not applicable because no important question of federal law is implicated.

For the foregoing reasons, the writ in No. 89-1506 must be denied.

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No. 89-1506

Supreme Court, U.S.
FILED
JUN 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JOSEPH M. GEDAN, et al.,

Petitioners,

v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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No. 89-1506

In The

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JOSEPH M. GEDAN, et al.,

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v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

I. SUMMARY OF ARGUMENT.

Respondent Earle A. Partington's Brief in Opposition proves why the sanctions ordered by the court of appeals against Petitioners here (the "State Officials") erode this Court's precedents, and otherwise merit review and reversal.

As the judgment below also conflicts with *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Cooter & Gell v. Hartmarx*.

In any case, the Petition in No. 89-1506 should be granted to correct the Ninth Circuit's departure, in its sanctions judgment, from principles of comity, equity, and restraint, and its improper invocation of Civil Rule 11 summarily to punish appellee-parties who seek their Rule 38 damages on appeal.

II. ARGUMENT.

A. Review Should Be Granted to Correct the Court of Appeals' Departure, in Punishing Petitioners' Request for Appellate Damages, from Settled Abstention and Constitutional Precepts.

Respondent labors long to establish a proposition we do not dispute: that "attorneys should be able to distinguish an appeal based on excellent arguments from a frivolous appeal" (Resp. Br. at 6; *see* Pet. at 21 (No. 89-1506)). Our first basis for reversal of the sanctions against us, however, is simply that, given the extraordinary burdens imposed on litigants, such as Respondent, who seek to enjoin ongoing state proceedings in this context, "a request for Rule 38 sanctions was at least arguable" (*id.* at 19). Seen clearly, the opposition brief does not address, let alone refute, this conclusion.

Contrary to this Court's recent decision in *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763 (U.S. June 11, 1990), Respondent, in large part simply invokes the law of the case below that the "arguments that *Middlesex* did not compel abstention were excellent" (Resp. Br. at 6 (citing 880 F.2d at 131)). As *Cooter & Gell* makes clear, this Court must be satisfied at the least that the court below did not rely "on a materially incorrect view of the relevant law in determining that [Petitioners'] pleading was not 'warranted by existing law or a good faith argument' for

changing the law." *Id.* at 4768; *see Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1987). Here, the Ninth Circuit's assessment of the "relevant law" clouded its view that our request for appellate damages itself warranted Rule 11 punishment. The judgment that Respondents' arguments for distinguishing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) were indisputably nonfrivolous is wrong, and merits review and reversal.[1]

As demonstrated in our Petition, the principles that were necessary to the success of Partington's appeal below were not simply theories that the State Officials "believed" "would prevail" (Resp. Br. 4). Rather, Partington's appeal rested in material part on challenges to the procedural scheme under Hawaii Supreme Court Rule 13 that themselves depended on reading what are, at best, ambiguities in state law to generate conflict with Partington's claimed federal rights. Pet. at 17-19. Not only were many of the conflicts irrelevant to any exception to *Younger* abstention, the arguments on appeal both

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[1] Significantly, Partington impliedly recognizes that the State Officials' motion for Appellate Rule 38 damages would have been well founded if it had demonstrated that, irrespective of Partington's underlying claims, no close questions existed involving "exceptions to *Younger* abstention principles and the application of those principles in *Middlesex*" (Resp. Br. at 5); Partington also offers no reasoned argument that the Rule 38 motion below was ill-founded insofar as Partington invoked the very narrow exception for statutes that are " ' "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply [them]." ' " *See* Pet. 18 n.7 (citing 880 F.2d at 128 (citations omitted)).

contravened precepts this Court has concluded are "beyond debate," *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988), and, quite simply, sought to infect the case with "plain error," *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

Well before *Frisby* and *DeBartolo* were decided, this Court reaffirmed these precepts of restraint in the *Younger* context in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14-15 (1987). Although *Pennzoil* provoked a number of concurrences, none of the concurring Justices found fault with the Court's requirement of "unambiguous" state procedural inhospitality as a pre-requisite to a federal injunction directed to state proceedings otherwise within *Younger*'s scope. 481 U.S. 1 at 19 (Brennan, J., joined by Marshall, J.); *id.* at 27 (Blackmun, J.); *id.* at 30 n.2 (Stevens, J.). Our request for appellate damages, in turn, rested in large measure on Respondent's total failure to address *Pennzoil*'s bar below. *See* Pet. at 15.

Respondent's own characterization of the asserted unarguably "excellent" grounds for appeal shows why the sanctions imposed below are wrong, and should be reversed. While Partington asserts that "close questions" were presented by his efforts to distinguish *Middlesex*, the issues he identifies (Resp. Br. at 5) depend on denigrating readings of state law that were foreclosed by controlling precedent, or, worse, on attacks on the integrity of judges that have been long condemned by the federal courts (*see id.* and *cf.* Pet. at 19-20 (citing cases)), or on elevation of federal interests " 'to a level that *Younger* squarely rejected more than fifteen years ago' " (Pet. at 15)).

Respondent implies that it was appropriate for the court below, in assessing the "relevant law," to ignore *Pennzoil* and the caselaw on which it relies, because

"*Pennzoil* presented 'an unusual fact situation' " "not involving any situation remotely similar to attorney disciplinary procedures" (Resp. Br. 6). But this sort of claim has been repeatedly rejected in other contexts, *see United States v. Stanley*, 483 U.S. 669, 680 (1987); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and, indeed, misreads *Pennzoil*. There, despite the unprecedented judgment against Texaco, and enormous threatened harm, abstention was still required. Indeed, even if Respondent's argument were a reason why denial of the State Officials' motion for damages might be sustainable, it offers no reason why Petitioners here were properly punished for making that motion.

Petitioners, in seeking to recover their damages on appeal, properly relied on the notion that, when evaluating the frivolity of Partington's appeal, "a precedent of this Court must be followed by the lower federal courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Respondent's brief makes clear that the Ninth Circuit's sanctions judgment ignored this teaching.

Contrary to Respondent's brief (Resp. Br. at 1-2), the sanctions judgment creates an anomalous privilege to file federal suits precisely where this Court has held federal interference with state proceedings to be improper. For this reason alone, the writ should be granted and the judgment reversed.

B. Review Should Be Granted to Correct the Ninth Circuit's Expansive Invocation of Rule 11 in the Appellate Courts.

Respondent also offers no persuasive ground for denying review as to our claim that the Court of Appeals

improperly relied on its "adoption" of Rule 11 as authority for issuing sanctions in the appellate courts. *See* Pet. at i, 17, 21-23. Indeed, as *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990), dictates reversal of, or at least severely undercuts, the sanctions judgment, the reasons for granting certiorari are plain.[2]

As *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990), confirms, the judgment below is plainly wrong, as "[n]either the language of [Fed. R. Civ. P.] Rule 11 nor the Advisory Committee Note suggests that the Rule could

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[2] Respondent, on this front, intimates, but does not argue specifically, that Petitioners are disabled from raising this ground, which was fully presented in our Petition. The suggestion (Resp. Br. 7) is wrong. The court of appeals, in the context of a vigorous debate between the majority and concurring and dissenting judge, "passed upon" the issue of Rule 11's applicability to conduct wholly on appeal. *See* 880 F.2d at 134-35, 148, A34-35, 81-83; *see also* Pet. App. 239-56 (No. 89-1506) (further briefing ordered by the panel). Even under the rigorous standards for bringing federal error up for review from the state courts, the record here would permit review. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 217-24 (1983); *cf. First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 n.8 (1987). Indeed, while Respondent suggests that the judgment below might be affirmed on other grounds (*See* Resp. Br. at 7-8), Respondents did not expressly rely on any ground other than Fed. R. Civ. P. 11 (*see* Pet. App. 192 (No. 89-1506)); nor is it shown how the distinct standards applicable to sanctions under Fed. R. App. P. 46, 28 U.S.C. § 1927, or the inherent power, are independently sustainable on the record below. *Compare Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). Indeed, Respondent virtually concedes the State Officials did not act in subjective bad faith, and "believed their arguments would prevail" (Resp. Br. at 4). In this context, this Court will "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical Center*, 485 U.S. 80, 86 (1988).

require payment for any activities outside the context of district court proceedings." *Id.*, 58 U.S.L.W. 4763, 4769.

The Ninth Circuit's adoption of Rule 11 cannot be squared with this logic. Pet. at 22-23. The tautological invocation of the "whenever relevant" language of Circuit Rule 1-1 cannot sustain the practice of applying Rule 11 to conduct wholly on appeal, as this Court has concluded that Rule 11 is *not* "relevant" to appellate proceedings. Indeed, the import of *Cooter & Gell* is that the Ninth Circuit could not, even by explicit circuit rule, adopt Rule 11 for use in the appellate courts. *See* 58 U.S.L.W. at 4768 (Rule 11 was designed in light of the district court's particular competence to "marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"). Here, as in *Cooter & Gell*, "[t]he Federal Rules of Appellate Procedure [and other sanctions authority] place a natural limit on Rule 11's scope." 58 U.S.L.W. at 4769. The sanctions here exceeded that "limit."

C. Review Should Be Granted to Correct the Court of Appeals' Departure from Settled Procedure in Awarding Sanctions.

Respondent's argument (Resp. Br. at 9-12) that Petitioners were afforded proper process before sanctions were awarded against them is untenable. Indeed, Respondent has no good answer to our claim that, "while properly concerned with the 'guarantee of fair procedure' in *state* court," "the Ninth Circuit paid little heed to this requirement in issuing its own sanctions against Petitioners" (Pet. 23).

Partington's claim that due process is lacking in the state courts (Resp. Br. at 11-12) has been addressed in our

Petition here (Pet. at 7-9, 13, 23-24), and in our papers in the related petition in No. 89-1531. For present purposes, it suffices to note that Partington's due process arguments make clear that the sanctions judgment below is wrong. Partington at least implies that summary process is inappropriate where a monetary sanction carriers with it reputational injuries, but seeks to avoid the impact of this logic by suggesting that Rule 11 sanctions have no such effect (*see* Resp. Br. at 11). This latter suggestion is, of course, incorrect. *See Cooter & Gell*, 58 U.S.L.W. at 4768 (finding is akin to finding of negligence). The claim that Petitioners were afforded due process is thus flawed.

Partington in the end does not dispute that sanctions "'may not be imposed upon a person who is not on notice of (a) the fact that sanctions are under consideration, [and] (b) the reasons why sanctions are under consideration,'" (Pet. at 24), or deny the existence of Circuit precedent that makes clear that a claim for affirmative relief made for the first time in a reply (or amicus) brief will not be considered. *See id* (citing *Northwest Acceptance Corp. v. Lynwood Equipment Inc.*, 841 F.2d 918, 924 (9th Cir. 1988)). Partington also does not dispute that Respondents made no motion for sanctions under Fed. R. App. P. 27, and that under Circuit Rule 39-1.6, it is improper to seek fees in a Reply or Amicus Brief. Nonetheless, Respondent asserts Petitioners ought to have moved to strike the requests that were so made, or for briefing (Resp. Br. at 10).

This novel understanding of Due Process is sufficiently at odds Due Process precepts to warrant correction, as we have sought (*see* Pet. at i, 24-25), under the supervisory power. Indeed, it is clear that litigants need

not anticipate, on pain losing a pre-deprivation hearing, changes in procedural law of the kind indulged here. *E.g.*, *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679 (1930). While the courts of appeals might be "well versed in recognizing frivolous requests" (Resp. Br. at 12), our contentions why sanctions should not be entered against the State officials plainly presented "arguable issues" warranting notice of the procedural posture and an opportunity to present at least written argument before sanctions were entered. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544 (1985). The proceedings warrant review and reversal.[3]

III. CONCLUSION

For the reasons above and in the Petition, the Court should grant the Petition in No. 89-1506 and summarily reverse that part of the judgment below (Part V thereof) imposing sanctions against the Petitioners, or set the case down for argument in this Court, and, thereon, reverse the sanctions. Because the Court of Appeals did not have the benefit of *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S.

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[3] Here, the Court need not even reach the Due Process question to reverse, as Fed. R. App. P. 27, which requires motions to be separately filed and so denominated, Fed. R. App. P. 28, which directs that a Reply Brief be directed "to the brief of the appellee," and Fed. R. App. P. 29, which requires that the court, in allowing an untimely amicus curiae brief, such as that allowed here, to "specify within what period an opposing party may answer," provide statutory grounds for reversal that would moot the substantial due process issues we have raised.

June 11, 1990), the Court may wish to grant the petition, vacate the judgment adverse to Petitioners, and remand for further consideration in light of *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990).[4]

Respectfully submitted, June 20, 1990.

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[4] Such a disposition, *see O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1985), would have the beneficial impact of curing Petitioners' procedural ground for relief, particular since *Cooter & Gell* addresses both the substantive standards for evaluating a Rule 11 motion (see 58 U.S.L.W. at 4768) as well as the propriety of Rule 11's invocation in the courts of appeals (*id.* at 4769-70), which are both central to our remaining issues.